

# National Indian Gaming Commission



## National Environmental Policy Act

### Procedures Manual

Draft Date: July 2, 2007

FORWARD.....	iv
CHAPTER 1: INTRODUCTION .....	1
1.1 PURPOSE.....	1
1.2 DISTRIBUTION.....	1
1.3 CANCELLATION.....	1
1.4 AUTHORITY.....	1
1.5 POLICY.....	1
1.6 GENERAL RESPONSIBILITIES.....	2
1.7 SCOPE.....	2
1.8 DEFINITIONS.....	3
1.9 APPLICABILITY.....	3
1.10 Section Reserved.....	3
CHAPTER 2: THE NEPA PROCESS.....	4
2.1 Introduction:.....	4
2.2 The relationship between the NIGC and NEPA;.....	4
2.3 Application of NEPA to NIGC decisions/actions;.....	4
2.4 Levels of NEPA review;.....	4
2.5 Specialized NIGC actions;.....	6
2.6 Early application of NEPA;.....	7
2.7 Key personnel responsibilities;.....	8
2.8 Public Hearings, Workshops and Meetings.....	10
2.9 Plain Language and Geographic Information.....	11
2.10 Reducing Paperwork.....	11
2.11 Reducing Delay.....	11
2.12 Intergovernmental and Interagency Coordination and Consultation.....	11
Chapter 3: Categorical Exclusions (CATEX) and Extraordinary Circumstances: .....	13
3.1 Introduction:.....	13
3.2 Categorical Exclusion (CATEX) Screening .....	13
3.3 Categorical Exclusions.....	13
3.4 Extraordinary Circumstances.....	15
3.5 Categorical Exclusion Documentation .....	16
CHAPTER 4: Environmental Assessments (EA) and Findings of No Significant Impacts (FONSI): .....	18
4.1 When to prepare an EA:.....	18
4.2 Proposed action not causing a significant environmental impact:.....	18
4.3 Proposed action causing a significant environmental impact:.....	18
4.4 Content of an EA .....	18
4.5 Actions normally requiring an Environmental Assessment (EA): .....	19
4.6 Time limits for EAs: .....	20
4.7 Adoption: .....	20
4.8 Impact Categories: .....	21
4.9 Environmental Assessment (EA) Process:.....	21
4.10 Preferred Environmental Assessment Format: .....	25
4.11 FINDING OF NO SIGNIFICANT IMPACT (FONSI).....	30
4.12 MONITORING MITIGATION.....	32

Effective date: TBD

Draft: July 2, 2007

4.13	DECISION DOCUMENTS FOR FINDINGS OF NO SIGNIFICANT IMPACT .....	33
4.14	TIERING AND PROGRAMMATIC ENVIRONMENTAL ASSESSMENTS.....	33
4.15	WRITTEN RE-EVALUATIONS .....	33
4.16	REVISED OR SUPPLEMENTAL ENVIRONMENTAL ASSESSMENTS OR FONSIs .....	34
4.17	Review/Comment on EAs prepared by other Agencies: .....	34
4.18	Reserved.....	34
CHAPTER 5: Environmental Impact Statements and Records of Decision .....		35
5.1	Introduction:.....	35
5.2	Roles and Responsibilities of the EIS Team:.....	35
5.3	Actions normally requiring an Environmental Impact Statement: .....	36
5.4	Impact Categories: .....	39
5.5	Environmental Impact Statement Process Overview:.....	39
5.6	Additional EIS process information: .....	40
5.7	Timing of Actions:.....	46
5.8	Draft EIS .....	47
5.9	Review and Approval of Final EIS .....	49
5.10	Notice of Availability of Final EIS .....	50
5.11	Distribution of Approved Final EIS.....	50
5.12	Record of Decision .....	50
5.13	Tiering and Programmatic EISs:.....	51
5.14	Time Limits for EISs .....	51
5.15	Written Reevaluation: .....	52
5.16	Revised or Supplemental EISs:.....	53
5.17	Referrals to Council on Environmental Quality (CEQ):.....	53
5.18	Review/Comment and Adoption of EIS's prepared by other Agencies: .....	53
5.19	Reserved.....	54
Appendix A- Resource Categories.....		1
Appendix B- Example MOU for EIS Cooperating Agencies .....		1
Appendix C- Third Party Contracting Guidance .....		1
D-1: Introduction and Purpose.....		1
D-2: Scope of Work.....		1
D-3: NIGC Evaluation and Selection .....		2
D-4: Financial and other interest disclosure .....		2

Effective date: TBD

Draft: July 2, 2007

## **FORWARD**

This manual was prepared and intended for use by National Indian Gaming Commission (NIGC) and those parties who seek approval of the NIGC in undertaking actions pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 – 2721. Specifically, NIGC personnel, Indian gaming proponents (tribes), their management or development contractors, and those contractors/consultants involved in the development of environmental review documents must use this manual in order to ensure compliance with the applicable requirements of the National Environmental Policy Act (NEPA) and the NIGC's NEPA procedures.

This manual contains information essential to meeting the procedural and substantive requirements established by the White House Council on Environmental Quality (CEQ) in its NEPA implementing regulations, 40 C.F.R. §§1505.1 and 1507.3.

Philip N. Hogen  
Chairman,  
National Indian Gaming Commission



## CHAPTER 1: INTRODUCTION

**1.1 PURPOSE.** This manual provides National Indian Gaming Commission (NIGC) policy and procedures to ensure agency compliance with the requirements set forth in the Council on Environmental Quality (CEQ) regulations for implementing the provisions of the National Environmental Policy Act of 1969, as amended, (NEPA), 40 Code of Federal Regulations (CFR) parts 1500-1508 and other related statutes and directives.

**1.2 DISTRIBUTION.** Notice of adoption and availability of this manual is distributed to all NIGC Directors and the General Counsel for distribution to appropriate NIGC personnel. The manual is available to Indian Gaming proponents, environmental consultants, the public, and other interested parties in electronic form. The manual will be located for viewing and downloading at <http://www.nigc.gov> by clicking on the link to the Environmental, Public Health and Safety page. If the public does not have access to the internet, they may obtain a computer disc containing the manual or a paper copy by contacting the NEPA Compliance Officer at 1441 L Street NW, Suite 9100, Washington D.C. 20005. The NIGC reserves the right to charge a fee equal to the reproduction costs.

**1.3 CANCELLATION.** (SECTION RESERVED)

**1.4 AUTHORITY.** NEPA and its implementing regulations, promulgated by CEQ in accordance with Executive Order (E.O.) 11514, Protection and Enhancement of Environmental Quality, March 5, 1970, as amended by E.O. 11991 (sections 2(g) and 3(h)), May 24, 1977, establish a broad national policy to protect and enhance the quality of the human environment, and develop programs and measures to meet national environmental goals. Section 101 of NEPA sets forth federal policies and goals to encourage productive harmony between people and their environment. Section 102(2) provides specific direction to federal agencies, sometimes called “action-forcing” provisions (40 CFR 1500.1(a), 1500.3, and 1507) on how to implement the goals of NEPA. The major provisions include the requirement to use a systematic, interdisciplinary approach (section 102(2)(A)) and develop implementing methods and procedures (section 102(2)(B)). Section 102(2)(C) requires detailed analysis for proposed major federal actions significantly affecting the quality of the human environment, providing authority to prepare environmental impact statements (EISs).

**1.5 POLICY.** It is the NIGC’s policy to:

- 1.5.1 Comply with the procedures and policies of NEPA and other related environmental laws, regulations, and orders applicable to NIGC actions.

The NIGC furthermore shall provide guidance designed to enhance and protect the national, tribal, state and local environmental quality that may be impacted by NIGC actions;

- 1.5.2 Seek and develop partnerships and cooperative agreements with other federal, tribal, state and local organizations/departments/agencies early in the NEPA process;
- 1.5.3 Ensure NEPA compliance and its documentation includes public involvement. Public involvement shall be sought during the appropriate stages of the NEPA process. Public involvement also includes disclosing information in a timely fashion to assist in the public's understanding of NIGC actions and impacts associated with those actions;
- 1.5.4 Interpret and administer, to the fullest extent possible, the policies, regulations, and public laws of the United States administered by the NIGC, including IGRA, and in accordance with sections 101 and 102 of NEPA;
- 1.5.5 Consider the environmental factors and potential impacts of tribal proposals and NIGC actions;
- 1.5.6 Consult, coordinate with, and consider policies and procedures of other federal, tribal, state and local organizations/departments/agencies;
- 1.5.7 Employ a systematic and interdisciplinary approach to NEPA compliance and documentation prior to taking a federal action or making a decision.

**1.6 GENERAL RESPONSIBILITIES.** Those NIGC officials responsible for making decisions are also responsible for taking the requirements of NEPA into account in those decisions and will be held accountable for that responsibility.

**1.7 SCOPE.** The NEPA process evaluates, identifies, and addresses impacts of the NIGC's actions on the human environment, including but not limited to noise, socioeconomic factors, land uses, air quality, and water quality. Chapter 2 of this manual presents an overview of the NEPA process. Depending upon the context and potential impacts, NEPA procedures can differ. Chapter 3 of this manual addresses those types of NIGC actions that do not normally require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS), called categorical exclusions, absent extraordinary circumstances. Chapters 4 and 5 of this manual outline the processes for preparing EAs and EISs. These procedures apply to classes of NIGC actions that have or may have a significant impact on the human environment. Appendix A

“Environmental Impact Categories”, presents a list of environmental resource categories to be evaluated in all EAs or EISs prepared for or submitted to the NIGC. Appendix B contains a draft Memorandum of Understanding that outlines the roles and responsibilities of cooperating agencies. The draft shall be used as a template. Appendix C provides Third Party Contracting guidance.

## **1.8 DEFINITIONS.**

1.8.1 The terminology used in the CEQ regulations (see 40 CFR part 1508) and Title 49 of the United States Code is applicable.

**1.9 APPLICABILITY.** The provisions of this manual and the CEQ regulations apply to actions directly undertaken by the NIGC and where the NIGC has sufficient control and responsibility to condition approvals of a non-federal entity. The requirements in this manual apply to, but are not limited to, all NIGC actions taken under the Indian Gaming Regulatory Act (IGRA). Exceptions to these requirements are listed in Chapter 2. The procedures in this manual shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date, except that this manual does not apply to decisions made and draft or final environmental documents issued prior to the effective date of this manual.

## **1.10 Section Reserved.**

## CHAPTER 2: THE NEPA PROCESS.

**2.1 Introduction:** This chapter will provide guidance to the responsible NIGC official (NEPA Compliance Officer), approving official (NIGC Chairman), and other NIGC decisionmakers in the NEPA process.

**2.2 The relationship between the NIGC and NEPA;** It is the responsibility of the NIGC to regulate Indian gaming in accordance with the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721. It is important that the NIGC comply with NEPA and other environmental laws/regulations/orders during its administration of these responsibilities. Compliance with NEPA and other environmental laws/ regulations/orders will ensure that the NIGC makes informed decisions prior to taking an action. It also goes to the furtherance of the NIGC's policies outlined in Chapter 1.

**2.3 Application of NEPA to NIGC decisions/actions;** In accordance with NEPA, environmental issues shall be identified and considered early in an action's planning process. The NIGC shall use a systematic, interdisciplinary approach. As appropriate, NIGC shall also involve local communities and coordinate with agencies and governmental organizations. Environmental permits and other forms of approval, concurrence, or consultation may be required, often from other agencies. Awareness of any applicable permit application and other review process requirements should be included in the planning process to ensure that necessary information is collected and provided to the permitting or reviewing agencies in a timely manner. This is especially true if applicable laws, regulations, or executive orders specify timeframes for these processes. Tribes/contractors or consultants should prepare a list noting all obvious environmental resources the Tribe's proposed action and alternatives it proposes would affect, including specially protected resources. Tribes/contractors or consultants should complete these tasks at the earliest possible time during project planning to ensure full consideration of all environmental resources and facilitate NIGC's NEPA process.

### **2.4 Levels of NEPA review;**

2.4.1 There are three (3) levels of NEPA review. The level of NEPA review will be dependent on the type and potential impacts of the action being taken by the NIGC. The types of actions taken by the NIGC will be:

2.4.1.1 An action that "normally requires an environmental impact statement [EIS]" (40 C.F.R. §1501.4(a)(1));

- 2.4.1.1.1 An EIS is required when an Environmental Assessment (EA) has been done for a proposed action and the impacts of that action will exceed the applicable threshold of significance for any resource category and those impacts cannot be mitigated to a level below the threshold of significance. If the NIGC anticipates that significant impacts will result from a proposed action, it can elect to prepare an EIS without first developing an EA. The NIGC may issue its Record of Decision (ROD) 30 days following the completion and publishing in the Federal Register of the Final EIS. The ROD represents the agency's official decision on the proposed action. The ROD must include all appropriate mitigation measures, as discussed in the Final EIS.
- 2.4.1.2 An action that is subject to NEPA but does not qualify for a CATEX (See Chapter 3) or warrant the preparation of an EIS requires the preparation of an Environmental Assessment (EA).
- 2.4.1.2.1 An EA is not required if the NIGC has elected to prepare an EIS on the proposed action. An EA is appropriate when the NIGC believes that impacts of the proposed action will not result in impacts that meet or exceed the threshold of significance for any resource category. When an EA is prepared and it is determined that the proposed action's impacts will not exceed the threshold of significance, the responsible NIGC official will prepare a Finding Of No Significant Impact (FONSI) to be issued by the NIGC Chairman. The FONSI must include all mitigation measures identified in the EA and required to avoid, eliminate, or reduce the impacts of the proposed action. The FONSI is the official NIGC determination that the proposed action will not result in any significant impacts to the human environment. It does not represent the agency's decision to implement or approve the proposed action.
- 2.4.1.3 An action that "normally does not require either an environmental impact statement or an environmental assessment is categorically excluded" (40 C.F.R. §1501.4(a)(2));
- 2.4.1.3.1 Categorical exclusions (CATEX) are a group of actions that typically will not have a significant individual or cumulative impact on the human environment. Unless the proposed action involves an extraordinary

circumstance (See Section 2.1.3.1.4 of this manual), an EIS or EA is not required.

- 2.4.1.3.2 An action that is typically categorically excluded may or may not have to be documented. The NIGC has determined which types of CATEX actions will be documented and which will not (See Chapter 3).

## **2.5 Specialized NIGC actions;**

- 2.5.1 There are some NIGC actions that for NEPA purposes do not meet the traditional meaning of “Federal actions”:

- 2.5.2 **Advisory Actions:** When the NIGC takes an action that is advisory in nature, the requirement to comply with NEPA does not apply. As a result, a CATEX, EA or EIS is not required. However, if the NIGC knows or anticipates that a subsequent federal action that is subject to NEPA might occur, it must point that fact out in the advisory action. The following are typical actions taken by the NIGC that are advisory in nature:

2.5.2.1 *The NIGC’s Office of General Counsel issues Indian Lands opinions;*

2.5.2.2 *The NIGC’s Office of General Counsel issues game classification opinions;*

2.5.2.3 *The NIGC’s Office of General Counsel issues advisory opinions regarding whether a contract is a management contract requiring the NIGC Chairman’s approval or violates IGRA’s sole proprietary interest requirement.*

- 2.5.3 **Enforcement Actions:** The following NIGC actions are administrative enforcement actions that are not considered to be “Federal actions” and are not subject to review under NEPA. (40 CFR § 1508.18(a)). As a result, a CATEX, EA or EIS is not required.

2.5.3.1 *Issue orders of temporary closure of gaming activities as provided in §2713(b) of IGRA;*

2.5.3.2 *Levy and collect civil fines as provided in §2713(a) of IGRA;*

2.5.3.3 *Make permanent a temporary order of the NIGC Chairman closing a gaming activity as provided in §2713(b)(2) of IGRA.*

2.5.3.4 *Issue subpoenas pursuant to an enforcement action as authorized in §2715 of IGRA.*

2.5.3.5 *Hold such hearings, sit and act at such times and places, take such testimony, receive such evidence, and render such decisions as the Commission deems appropriate, when done pursuant to an enforcement action, as authorized in §2706(b)(8) of IGRA.*

2.5.3.6 *Administer oaths or affirmations to witnesses appearing before the Commission, when done pursuant to an enforcement action, as authorized in §2706(b)(9) of IGRA.*

2.5.3.7 *Issue warning letters, notices of violation, civil fine assessments, closure orders, or any other action consistent with the Commission's authority to enforce IGRA, the NIGCs regulations, and approved tribal gaming ordinances.*

2.5.4 **Emergency Actions:** In the event of an emergency situation, the NIGC may be required to take an action to prevent or reduce the risk to the environment, public health, or safety that may impact the human environment without evaluating those impacts under NEPA. Upon learning of the emergency situation, the NIGC NEPA Compliance Officer will immediately inform CEQ of the emergency situation. In those cases, the NIGC NEPA Compliance Officer (in consultation with CEQ) will obtain guidance on NEPA compliance. The NIGC NEPA Compliance Officer will provide continued follow-up consultation with CEQ throughout the duration of the emergency situation. The provisions of this section do not apply to actions taken after the emergency situation has been resolved or those related to recovery operations.

2.5.5 **Statutory Conflict:** In some cases, the NIGC's statutory requirements are inconsistent with NEPA. The following NIGC action(s) have been determined to fit into this category:

2.5.5.1 *Approve tribal ordinances or resolutions regulating Class II gaming and Class III gaming as provided in §2710 of the IGRA.*

## **2.6 Early application of NEPA;**

2.6.1 Before a tribe submits any NEPA document for a proposed action to the NIGC, it should consult with the NIGC's NEPA Compliance Officer. The consultation should informally present the proposed action as the Tribe has planned it. The NEPA Compliance Officer will then assist the Tribe to identify the action's potential environmental impacts. This will help ensure that there will be an

evaluation of a suitable range of alternatives. It will also allow the NIGC to ensure that the appropriate level NEPA review has been selected.

- 2.6.2 Early consultation with the NIGC's NEPA Compliance Officer and the *Cooperating Agency* environmental personnel will help determine which agency will be "Lead Federal Agency."
- 2.6.3 Consultation with other federal, tribal, state and local agencies will ensure the analysis of environmental impacts for individual resource categories is sufficient for approval, concurrence, or permitting by another agency.
- 2.6.4 Early and frequent involvement of the public will ensure the public is provided with the most accurate information regarding the proposed action and meets the NEPA policy to "Encourage and facilitate public involvement in decisions which affect the quality of the human environment." (§1500.2(d))

## **2.7 Key personnel responsibilities;**

### 2.7.1 NIGC responsibilities:

2.7.1.1 *NIGC Chairman (Chairman)*: The Chairman shall approve and sign all NEPA decision documents (FONSI, ROD).

2.7.1.2 *NIGC Director of Contracts (Director)*: The Director will supervise the day-to-day activities of the NEPA Compliance Officer. The Director will ensure that all matters raised by the NEPA Compliance Officer will get the attention due from the appropriate NIGC personnel.

2.7.1.3 *NIGC NEPA Compliance Officer (Officer)*: The Officer shall be responsible for providing the NIGC with the most up-to-date environmental information that could affect NIGC actions. The Officer shall have either extensive experience, education or both in NEPA compliance. The Officer shall develop and propose NIGC policy as it relates to NEPA. The Officer will be responsible for the technical review of all CATEX documentation, EAs and EISs. If a Tribe prepares a CATEX or EA document, the Officer must advise and assist with its preparation. The Officer shall independently review and evaluate the CATEX or Draft/Final EA to ensure the NIGC's decision is made objectively and no conflict of interest exists. The Officer will then make recommendations regarding the decision to prepare an EIS. When an EIS is required, it shall be the Officer who reviews the



qualifications and selects the third-party contractor. The Officer will be the NIGC's Project Manager and direct all work being done for inclusion in the EIS. The Officer will prepare or have prepared NEPA decision documents (FONSI or RODs) for proposed actions. The officer may also be referred to in this manual as the "responsible NIGC official."

2.7.1.4 *NIGC Office of General Counsel (OGC)*: The OGC shall be responsible for reviewing all EISs and providing a determination regarding the EISs legal sufficiency. The OGC shall be consulted on legal matters that arise during the preparation of any NEPA compliance document.

2.7.2 *Lead/Cooperating Agencies responsibilities*: The roles of lead and cooperating agencies can be found in CEQ regulations §1501.5 through §1501.8. In addition to the rights and responsibilities found in the CEQ regulations, a Memorandum of Understanding (MOU) should be executed to document each agency's rights and responsibilities that are specific to a particular proposed action. When other federal, tribal, state and local agencies/organizations request cooperating agency status, the NIGC's decision regarding their status should be documented by entering into a Memorandum of Understanding (MOU) (See Appendix B).

2.7.3 *Tribe responsibilities*: The tribe, after consultation with the NIGC NEPA Compliance Officer, shall be responsible for the preparation of CATEX and EA documentation for its proposed action. The tribe is also responsible for correcting deficiencies in the documentation to the satisfaction of the NIGC. During the preparation of an EIS, the tribe's role will be limited to providing planning information and other environmental information, as appropriate. The tribe is responsible for funding the preparation of the NEPA review document.

2.7.4 *Contractors/Consultants (Consultants) responsibilities*: Consultants used to prepare NEPA review documents for the NIGC or for a non-NIGC party seeking NIGC approval must comply with this manual. Consultants preparing EISs are required to sign a disclosure statement in accordance with 40 CFR 1506.5(c). Consultants shall keep and maintain an administrative record for all EA/EIS(s) prepared for proposed NIGC action(s).

2.7.5 *Public responsibilities*: NEPA is a process that requires public involvement. It not only requires an agency to consider environmental information when it makes a decision, but also requires the public's views concerning that environmental information. At appropriate times in the NEPA process the public will be made aware of the environmental information concerning a proposed action and will be given an opportunity

to provide their views to the NIGC. The public will be provided the same opportunity to participate before the NIGC makes substantial changes to this manual.

- 2.7.5.1 The NIGC or Tribe should involve the public early in the NEPA process. In most cases, the public's first involvement will be during scoping. The extent to which the public is involved in scoping will be dependent on the complexity and context of the proposed action.
- 2.7.5.2 The public must also be involved during the draft and final EA/EIS stages. The public must be given an opportunity to review and provide comments on the NEPA document. Comments received on a draft EIS and the NIGC's responses will be contained in an appendix to the final document. Final EAs should document that public comments on the draft were considered before the final EA was published.
- 2.7.5.3 When possible, the public process used to satisfy NEPA should also be used to meet the other statutory requirements that require public involvement (e.g., Section 106 of the National Historic Preservation Act, Executive Order 12898, etc).

## ***2.8 Public Hearings, Workshops and Meetings***

- 2.8.1 The information presented in a public hearing/workshop or meeting will contribute to the success of the NEPA process. In determining which is the appropriate forum to disclose environmental information about the proposed project, the complexity and potential magnitude of environmental impacts must be considered. Also consider the degree of interest that is exhibited by other federal, tribal, state and local authorities and the public.
  - 2.8.1.1 When the NIGC plans to hold a public hearing, workshop or meeting for the purposes of obtaining public comments on a draft EA or EIS, the draft document should be available to the public for at least 15 days before the hearing/workshop/meeting occurs. A public announcement regarding the hearing/workshop/meeting on a draft NEPA document should appear in local newspapers that have general circulation. For a draft EIS, a Notice of Availability (NOA) will also be published in the Federal Register by EPA. The content of notices announcing a hearing, workshop or meeting will vary depending on the type of NEPA document being prepared. See sections 4 and 5 of this manual for content of notices announcing a draft, final EA and/or FONSI or a draft, final EIS and/or ROD, respectively.

## **2.9 Plain Language and Geographic Information**

- 2.9.1 Information contained in a NEPA document prepared in accordance with this manual must be disclosed in a manner in which the public will be able to participate in the NEPA process. To aid in this, preparation of NEPA documents by or for the NIGC must comply with Executive Order 12906, Coordinating Geographic Data Acquisition and Access.

## **2.10 Reducing Paperwork**

- 2.10.1 CEQ regulation (40 CFR 1500.4) encourages the reduction of paperwork. Without compromising the administrative record for a proposed action, the NIGC should, to the greatest extent possible, combine NEPA requirements with other applicable environmental laws and regulations. The NIGC will also have joint documents prepared whenever possible. In addition, information may be incorporated by reference when appropriate.

## **2.11 Reducing Delay**

- 2.11.1 CEQ regulations (40 CFR §1500.5) require agencies to reduce delay. The responsible NIGC official shall reduce delay by doing the following:

2.11.1.1 Integrating other environmental requirements (e.g. permitting and approvals) early in the NEPA process. In some cases, integration may require NEPA and other environmental requirements to occur simultaneously.

2.11.1.2 Develop and maintain relationships with other federal, tribal, state and local agencies/organizations. As a part of maintaining a relationship, the responsible NIGC official shall ensure prompt resolution of disputes under 40 CFR §1501.5.

2.11.1.3 Ensure the tribes and consultants develop reasonable and achievable goals and milestones as part of the NEPA process.

2.11.1.4 Use the NEPA documentation to fulfill other environmental documentation requirements.

## **2.12 Intergovernmental and Interagency Coordination and Consultation**

The NIGC official or the Tribe, when appropriate, will consult with other federal, tribal, state and local agencies/organizations early and often in the NEPA process. During the NEPA process, consultation will include scoping, commenting on the environmental impacts of the proposed action, reviewing draft

Effective date: TBD

Draft: July 2, 2007

and final NEPA documents, providing input on the preparation of NIGC findings, and developing appropriate mitigation strategies. In addition to these agencies' input during the NEPA process, these agencies may also be consulted regarding other environmental requirements (e.g. permitting and approvals).

2.12.1 Tribal Consultation shall be conducted in accordance with the NIGC's Government-to-Government Tribal Consultation Policy, as may be amended, and Executive Order 13175.

Discussion Draft

## Chapter 3: Categorical Exclusions (CATEX) and Extraordinary Circumstances:

**3.1 Introduction:** This chapter will explain the types of NIGC actions that must comply with NEPA but are typically categorically excluded. This chapter will also discuss the circumstances in which those actions will not be categorically excluded and will require the preparation of an EA or EIS. The responsible NIGC official shall be consulted if there is a question regarding the applicability of a CATEX or possible extraordinary circumstances to a proposed action/project.

### 3.2 Categorical Exclusion (CATEX) Screening

The use of a CATEX can only be applied to an action if **all** of the following criteria are met:

- 3.2.1 The responsible NIGC official must determine that the action has not been segmented in order for the NIGC action to meet the definition of an action that can qualify for a CATEX. Segmentation can occur when an action is broken into smaller parts in an effort to avoid properly documenting significant impacts associated with the complete action. Segmentation can also occur when the NIGC action is too narrowly defined and the potential impacts are minimized in order to avoid a higher level of NEPA documentation. The scope of an action must include the consideration of connected, cumulative, and similar actions (See 40 C.F.R. §1508.25).
- 3.2.2 The responsible NIGC official must determine if the NIGC action will involve any of the extraordinary circumstances as defined in Section 3.4 of this manual.
- 3.2.3 The responsible NIGC official must determine that the NIGC action is encompassed by one of the listed CATEXs in Section 3.3 of this manual.

### 3.3 Categorical Exclusions

In accordance with Chapter 2, Section 2.4.1.3, the NIGC, based on past experience with similar actions, has determined that the following types of actions are categorically excluded and do not require the preparation of an EA or EIS because they will not individually or cumulatively result in a significant impact on the human environment. These types of federal actions meet the criteria established in 40 CFR 1508.4.

- 3.3.1 **CATEGORY 1-** Administrative and Routine Office Activities:
  - Normal personnel, fiscal, and administrative activities involving personnel (recruiting, hiring, detailing, processing, paying, supervising and records keeping).

- Preparation of administrative or personnel-related studies, reports, or investigations.
- Routine procurement of goods and services to support operations and infrastructure, including routine utility services and contracts.
- Normal administrative office functions (record keeping; inspecting, examining, and auditing papers, books, and records; processing correspondence, developing and approving budgets; setting fee payments; responding to request for information).
- Routine activities and operations conducted in an existing non-historic structure which are within the scope and compatibility of the present functional use of the building, will not result in a substantial increase in waste discharge to the environment, will not result in substantially different waste discharges from current or previous activities, and will not result in emissions that exceed established permit limits, if any. (Record of Environmental Consideration, REC, documentation required).
- Internal NIGC operations training.

**3.3.2 CATEGORY 2-** Regulation, Monitoring and Oversight of Indian Gaming Activities:

- Promulgation or publication of regulations, procedures, manuals, and guidance documents that will not individually or cumulatively result in a significant impact on the human environment, based on experience gained with substantively similar actions of the NIGC or other federal agency that have been environmentally evaluated.
- Support of compliance and enforcement functions by conducting compliance training for tribal gaming regulators and managers in classrooms, meeting rooms, gaming facilities, or via the internet.
- Preparing and issuing subpoenas, holding hearings, and taking depositions for informational gathering purposes, not associated with administrative enforcement actions. (NOTE: activities associated with administrative enforcement actions are not subject to NEPA review, and therefore need not be categorically excluded.)

**3.3.3 CATEGORY 3-** Management Contract and Agreement Review Activities:

- Approve or disapprove management contracts and collateral agreements that meet the following criteria: (1) involve no physical construction, other than interior renovations and minor exterior work on or in structures that are not listed or eligible for listing on the National Register of Historic Places; and (2) are not associated with plans to considerably increase patronage (REC documentation required).

### **3.4 Extraordinary Circumstances**

Some types of actions that would normally be categorically excluded may not qualify for a CATEX because an extraordinary circumstance exists. (See 40 CFR 1508.4). The responsible NIGC official must evaluate each proposed action and use best professional judgment to determine if it meets the CATEX requirements in Section 3.2.1 **and** does not have any extraordinary circumstances. If the proposed action has one or more of the following conditions, extraordinary circumstances exist and the action cannot be categorically excluded.

- 3.4.1 There is a reasonable likelihood the proposed action/project will have a significant impact on public health or safety.
- 3.4.2 There is a reasonable likelihood the proposed action/project will have a significant impact (direct, indirect, or cumulative).
- 3.4.3 There is a reasonable likelihood the proposed action/project would involve effects on the environment that involve risks that are highly uncertain, unique, or are scientifically controversial.
- 3.4.4 There is a reasonable likelihood the proposed action/project would violate one or more federal, tribal, state, or local environmental law/regulation/order.
- 3.4.5 There is a reasonable likelihood the proposed action/project will have an adverse effect, to include the degradation of scientific, cultural, or historic resources protected by the National Historic Preservation Act of 1966, as amended.
- 3.4.6 There is a reasonable likelihood the proposed action/project will have an impact on natural, ecological, or scenic resources of federal, tribal, state and/or local significance. These resources include federal or state listed endangered, threatened, or candidate species or designated or proposed critical habitat under the Endangered Species Act (ESA); resources protected by Coastal Zone Management Act (CZMA); resources protected by the Fish and Wildlife Coordination Act; prime, unique, tribal, state or locally important farmlands; and federal or state listed wild or scenic rivers.
- 3.4.7 There is a reasonable likelihood the proposed action/project will cause a division or disruption of an established community, planned development, or is inconsistent with existing community goals/plans.
- 3.4.8 There is a reasonable likelihood the proposed action/project will cause an increase in surface transportation congestion that will decrease the level of service below acceptable levels, as defined by the appropriate federal,

tribal, state, or local agency with jurisdiction for that portion of the transportation system.

- 3.4.9 There is a reasonable likelihood the proposed action/project will impact air quality or violate federal, tribal, state, or local air quality standards under the Clean Air Act Amendments of 1990.
- 3.4.10 There is a reasonable likelihood the proposed action/project will impact water quality, sole source aquifers, public water supply systems or tribal, state, or local water quality standards established under the Clean Water Act and the Safe Drinking Water Act.
- 3.4.11 There is a reasonable likelihood the proposed action/project will have effects that are likely to be highly controversial on environmental grounds. The term “controversial” means a substantial dispute exists as to the size, nature, or effect of the proposed action. The effects of an action are considered highly controversial when a reasonable disagreement exists over the proposed action’s/project’s risk of causing environmental effects. Opposition of this nature from federal, tribal, state, or local agencies/organizations or by a substantial number of persons affected by the proposed action should be considered in determining whether or not a reasonable disagreement exists.

### **3.5 Categorical Exclusion Documentation**

- 3.5.1 The purpose of categorical exclusions is to reduce paperwork and delay. The NIGC is not required to repeatedly document actions that qualify for a categorical exclusion and do not involve an extraordinary circumstance (See 40 CFR §1500.4(p)).
- 3.5.2 In some cases, the NIGC will document its decision to treat a particular action as categorically excluded from further NEPA review. In those cases, a Record of Environmental Consideration (REC) will be documented:
- A complete description of the proposed NIGC action/project.
  - The CATEX that relied upon, including a brief discussion of why there are no extraordinary circumstances.
  - Supplemental documentation that supports the conclusions in the narrative. Examples include exhibit(s) showing boundaries of historical or archeological site(s) previously identified near the proposed project, documentation from the U.S. Fish and Wildlife Service noting that no endangered species or habitat is present near the proposed project, evidence that the proposed project site is located



Effective date: TBD

Draft: July 2, 2007

outside any non-attainment area(s), etc. In some cases, a “no effect” determination from the SHPO/THPO may be required.

- The following statement: *I certify that, to the best of my knowledge, the information provided is the best available information and is accurate.*
- A signature from an environmental professional with a signature block that includes the professional’s credentials.

Discussion Draft

**CHAPTER 4: Environmental Assessments (EA) and Findings of No Significant Impacts (FONSI):** This chapter will provide information regarding the preparation of an EA and FONSI. The EA must provide all pertinent information to aid the NIGC in its decision-making process. If the information contained in the EA demonstrates that the proposed action will not have significant impact on the human environment, the NIGC can then issue such a finding of no significant impact, otherwise known as a FONSI.

**4.1 When to prepare an EA:** An EA will be prepared when a proposed action meets the following conditions:

- 4.1.1 The proposed action is not categorically excluded in accordance with Chapter 3;
- 4.1.2 The proposed action is normally categorically excluded, but extraordinary circumstances exist in accordance with Chapter 3;
- 4.1.3 The proposed action is not one that requires the preparation of an EIS in accordance with Chapter 5;

**4.2 Proposed action not causing a significant environmental impact:** When the NIGC, upon reviewing the EA, has determined that the proposed action will not cause a significant environmental impact, the NIGC NEPA Compliance Officer will prepare or have prepared a Finding of No Significant Impact (FONSI) for review and signature by the NIGC Chairman.

**4.3 Proposed action causing a significant environmental impact:** When the NIGC, upon reviewing the EA, has determined that the proposed action will cause a significant environmental impact, and mitigation measures will not reduce the impact below the appropriate threshold of significance, the NIGC NEPA Compliance Officer will prepare and issue a Notice of Intent (NOI) to prepare an EIS (See Chapter 5). If it is anticipated that the proposed project will result in a significant environmental impact that cannot be mitigated, the NIGC can decide to prepare an EIS without first developing an EA.

#### **4.4 Content of an EA**

- 4.4.1 Any EA prepared for the NIGC must contain a brief discussion of the proposed action, the need for the proposed action, a reasonable range of alternatives, the environmental impacts of the proposed action and alternatives, a list of alternatives eliminated from further analysis with an explanation of why they were eliminated, mitigation measures needed to

reduce environmental impacts to below the level of significance, and a list of the agencies and persons consulted.

- 4.4.2 The level of detail and depth of impact analysis should normally be limited to the minimum needed to determine whether the proposed action or alternatives retained for further analysis would result in any significant environmental impacts.
- 4.4.3 The EA will contain objective analyses to support its environmental impact conclusions. The EA must not draw any conclusions regarding the decision to prepare an EIS. The decision whether to prepare an EIS will be made by the responsible NIGC official and documented in either an NOI or a FONSI.
- 4.4.4 Previous NEPA analyses should be used in a tiered analysis or transferred and used in a subsequent analysis to enhance the content of an EA whenever possible.

#### **4.5 Actions normally requiring an Environmental**

**Assessment (EA):** The following are examples of actions that normally will require the preparation of an EA. When a proposed project involves multiple actions by the NIGC, Cooperating Agency and/or other federal agencies, the overall significance of these actions, when viewed together, governs whether an EA or an EIS is required. Consultation with the other agencies or organizations may be required to ensure all federal actions are adequately covered by the NEPA document prepared.

- 4.5.1 Approval of a new management contract, or a modification of an existing management contract, that involves, either directly or through a collateral agreement, development of a new Indian gaming facility, and it can be demonstrated that the potential impacts are not expected to exceed, or can be mitigated to a level below, the appropriate level(s) of significance.
- 4.5.2 Approval of a new management contract, or a modification of an existing management contract, that involves, either directly or through a collateral agreement, a physical expansion of an existing facility, and it can be demonstrated that the potential impacts are not expected to exceed, or can be mitigated to a level below, the appropriate level(s) of significance.
- 4.5.3 Approval of a new management contract, or a modification of an existing management contract, that does not involve a physical expansion of the facility, but where the management contractor plans to increase patronage, and it can be demonstrated that the potential impacts of the increased patronage are not expected to exceed, or can be mitigated to a level below, the appropriate level(s) of significance.

**4.6 Time limits for EAs:** The information contained in an EA is only valid for finite period of time. This section will outline when an EA's information must be updated.

4.6.1 A draft EA is valid for a period of three (3) years. If the responsible NIGC official has not prepared and issued a FONSI within three (3) years of receipt of the Final EA, a written re-evaluation (See Section 4.15) must be prepared and submitted to the responsible NIGC official for consideration and determination if the alternatives, impacts, existing environment, and mitigation measures in the EA remain applicable, accurate, and valid. If there has been a significant change in these factors from that which was originally considered in the EA, a supplement to the EA (See Section 4.16) or a new EA must be prepared in accordance with the procedures of this chapter.

4.6.2 For EAs where the NIGC has approved and issued a FONSI, the EA's information must be reviewed and updated, if necessary, when the following conditions have been established:

4.6.2.1 If major steps toward implementation of the project (such as the start of construction, substantial acquisition, or relocation activities) have not commenced within three (3) years from the date of issuance of the FONSI, a written re-evaluation (See Section 4.15) of the continued adequacy, accuracy, and validity of the EA will be prepared and submitted to the responsible NIGC official. If there have been significant changes in the project, the affected environment, anticipated environmental impacts, or proposed mitigation measures, as appropriate, a new or supplemental EA (See Section 4.16) will be required.

4.6.2.2 If the proposed project is to be implemented in stages or requires successive federal approvals, a written re-evaluation (See Section 4.15) of the adequacy, accuracy, and validity of the EA will be made at major approval points that occur more than three (3) years after issuance of the FONSI, and a new or supplemental EA may be required.

**4.7 Adoption:** In some cases, the NIGC may adopt, in whole or in part, a draft or final EA or the EA portion of an EA/FONSI prepared for another federal, tribal, state and local agency/organization if it meets the requirements of this chapter. As part of the adoption process:

4.7.1 Prior to adoption of another agency/organization's EA, the NIGC must complete an independent evaluation of the information contained in the EA, take full responsibility for scope and content that addresses NIGC actions, and issue its own FONSI. If the EA is found to comply with this

chapter and relevant provisions of CEQ regulations, the responsible NIGC official will recommend adoption and signature to the NIGC Chairman.

- 4.7.2 When appropriate and efficient, a responsible NIGC official may augment such an EA when it is essentially, but not entirely, in compliance with this chapter and/or relevant provisions of CEQ regulations, in order to make it compliant.
- 4.7.3 Adoption or augmentation of an EA shall receive the same public participation that the EA would have received if it had originated with the NIGC.
- 4.7.4 If the NIGC decides to adopt, in whole or in part, a draft or final EA or the EA portion of an EA/FONSI prepared for another federal, tribal, state or local agency/organization, the time requirements established in Section 4.6 shall apply.

**4.8 Impact Categories:** Appendix A of this manual identifies resource categories that the NIGC examines for its actions under NEPA. It should be noted that the list of resource categories in Appendix A is not exhaustive. In some circumstances, additional resource categories may need to be added. It is recommended that prior to conducting analysis under any of these categories, the responsible NIGC official be consulted regarding methodologies, thresholds of significance, mitigation measures, and permitting.

**4.9 Environmental Assessment (EA) Process:** This section shall apply when the responsible NIGC official has determined that the proposed action cannot be categorically excluded and the anticipated environmental impacts do not warrant preparation of an EIS.

- 4.9.1 The EA process begins with the responsible NIGC official or Tribe proposing the action, gathering background data, and coordinating/consulting with other agencies. This information will be used to formulate the proposed action and reasonable alternatives to achieve the project's purpose and need.
- 4.9.2 The responsible NIGC official or tribe will then develop a purpose and need statement for the proposed project. The responsible NIGC official will determine the adequacy of the purpose and need statement for the project.
- 4.9.3 While not required by CEQ regulations, the responsible NIGC official and Tribe proposing the action may elect to initiate scoping. If it is determined to conduct scoping, the public will be involved to the extent practicable.

4.9.4 The responsible NIGC official or Tribe proposing the action will have the EA document prepared with a level of analysis sufficient to:

4.9.4.1 Understand the purpose and need for the proposed action, identify a reasonable range of alternatives (including the no-action alternative), and assess potential environmental impacts.

4.9.4.2 Determine if potential environmental impacts are significant enough to require the preparation of an EIS or if a FONSI can be issued.

4.9.4.3 Identify any permits, licenses, other approvals, or reviews that apply to the proposed action.

4.9.4.4 Identify agencies, including cooperating agencies, consulted.

4.9.4.5 Identify all public involvement activities (e.g. scoping or public workshops).

**Figure 4-1: Environmental Assessment Process for an NIGC action**

<b>Step 1</b>	The responsible NIGC official or tribe proposing the action formulates the proposed action and a reasonable range of alternatives to achieve the project's purpose and need.
<b>Step 2</b>	Responsible NIGC official or Tribe proposing the action collects background data.
<b>Step 3</b>	Responsible NIGC official determines the need for an EA.
<b>Step 4</b>	Initiate scoping, if appropriate, and determine issues and alternatives to be addressed.
<b>Step 5</b>	Prepare preliminary draft EA.
<b>Step 6</b>	Responsible NIGC official and other cooperating agencies review preliminary draft EA.
<b>Step 7</b>	Prepare a revised draft EA in accordance with appropriate comments from the responsible NIGC official and other cooperating agencies.
<b>Step 8</b>	Circulate the revised draft EA to the public and other federal, tribal, state and local agencies/organizations for comment.
<b>Step 9</b>	Prepare final EA based on comments received, and publish the final EA or hold publication until the FONSI is published (See Step 11).
<b>Step 10</b>	Responsible NIGC official determines significance of impacts
<b>Step 10a</b>	If impacts are NOT significant, responsible NIGC official prepares or has prepared a FONSI for the NIGC Chairman's review and decision.
<b>Step 10b</b>	If impacts ARE significant, responsible NIGC official proceeds with an EIS (See Chapter 5). Do not go to Step 11.
<b>Step 11</b>	Publish the FONSI and the final EA, if not previously published (See Step 9).
<b>Step 12</b>	NIGC proceeds with action, and if applicable, mitigation and monitoring.

- 4.9.5 The EA should present detailed analysis, commensurate with the level of impact of the proposed action and alternatives, to determine whether any impacts will be significant. If the proposed action and its alternatives will not cause significant impacts within the applicable resource categories (see Appendix A), a brief statement describing the factual basis for the conclusion that the action is not likely to cause significant environmental impacts is sufficient. If the NIGC or tribe has experience with an environmental management system (EMS) that includes monitoring of the implementation of actions similar to the proposed action and alternatives, the EMS may provide a factual basis for an assessment of the potential impacts.
- 4.9.6 To ensure that the EA is concise and clear about the basis for its conclusions, the NIGC may incorporate by reference other documents and analyses. Referenced material must be reasonably available to the public, either in existing NEPA documents or in general background information, documents or studies prepared for other purposes.
- 4.9.7 Internal review of a preliminary draft EA is conducted by the NIGC NEPA Compliance Officer, any cooperating agency's NEPA points of contact, and the tribe proposing the action. The NEPA Compliance Officer is responsible for reviewing the EA and ensuring technical requirements have been met. Cooperating agency NEPA points of contact are responsible for ensuring the EA meets their agency's NEPA requirements. The Tribe shall review the EA to ensure it fully encompasses the project that it has proposed and that the tribe is prepared to undertake all proposed mitigation measures. Upon completion of the internal review, the NIGC NEPA Compliance Officer will consolidate comments and forward them to the Consultant with instructions to revise the EA.
- 4.9.8 Following the internal review, preparation of the EA should be coordinated with other agencies when the action involves resources protected by special purpose laws or administrative directives. Those agencies that have special expertise should also be consulted, as necessary. Examples of special purpose laws or directives include, but are not limited to, actions involving: Section 404 of the Clean Water Act; Section 106 of the National Historic Preservation Act; Section 7 of the Endangered Species Act; and Section 307 of the Coastal Zone Management Act. Examples of agencies with special expertise include, but are not limited to, the Federal Highway Administration, state transportation authorities, and local planning agencies.
- 4.9.9 The public, other federal, tribal, and state agencies, and other government entities shall be given an opportunity to review and comment on the draft

EA. The review and comment period for the draft EA shall not be less than 30 days. During the comment period, it is recommended that a public meeting/workshop be held, no sooner than fifteen (15) days following the draft EA being circulated, to further explain the methodologies used in the analysis and conclusions reached in the document. Notice of the meeting/workshop must be published in a local newspaper with general circulation. At a minimum, the notice must contain the following information: (1) Date, time, place, and time period during which written comments will be accepted; (2) Description of the proposed action/project; (3) Location(s) where the document can be reviewed; (4) Contact information of the responsible NIGC official (NEPA Compliance Officer). Upon receipt of comments from the parties listed above, the responsible NIGC official will determine whether the analyses used to evaluate the impacts on each environmental resource category in the EA are sufficient, or if additional environmental analysis is needed, and will have the final EA prepared accordingly.

4.9.10 The final EA will then be made available to the public, and federal, tribal, state and local agencies/organizations for their review. This review period shall not be less than 30 days. Based on comments received, the responsible NIGC official shall determine if additional environmental analysis is needed. If additional analysis is needed, the final EA may be revised and made available in accordance with this section. If no additional analysis is needed and if it is determined that there are no significant impacts or mitigation has reduced all impacts to below the appropriate level of significance, a Finding of No Significant Impact (FONSI) will be prepared in accordance with section 4.11 of this manual.

4.9.11 If the NIGC, as a commenting or cooperating agency, does not accept an EA prepared by another agency, the responsible NIGC official shall specify in his or her comments to that agency whether any additional information is needed or describe the mitigation measures the NIGC considers necessary to adopt or concur with the other agency's findings.



**Figure 4-2: Environmental Assessment Content**

<b>PURPOSE</b>	Assist agency planning and decision-making by summarizing environmental impacts to determine need for: <ul style="list-style-type: none"><li>• An EIS</li><li>• Mitigation Measures</li></ul>
<b>SCOPE</b>	Addresses the proposed action's and reasonable alternatives' impacts on the affected environmental resources.
<b>CONTENT</b>	Describes and identifies: <ul style="list-style-type: none"><li>• Purpose and need for the proposed action/project</li><li>• Proposed action/project</li><li>• Reasonable range of alternatives considered (including a no-action alternative)</li><li>• Affected environment (existing conditions)</li><li>• Environmental impacts of the proposed action and alternatives</li><li>• Mitigation measures</li><li>• Federal, tribal, state and local agency/organizations consulted</li></ul>
<b>PUBLIC PARTICIPATION</b>	Provide opportunities for public participation to the extent practicable

**4.10 Preferred Environmental Assessment Format:** This section will provide information regarding the NIGC's preferred EA format. While CEQ does not specify what format should be used for an EA, use of the following format will aid the NIGC in its review of the EA and ensure integrated compliance with other environmental laws, regulations, and applicable Executive Orders with NEPA review.

4.10.1 *Cover Page:* The cover should be clearly label "Environmental Assessment". It should also identify, where applicable, the subject tribe, the name of the subject gaming facility, and location of the proposed project. When an EA is prepared by a consultant, the cover page should also include "This Environmental Assessment becomes a Federal document when evaluated and signed/dated by the responsible NIGC official."

4.10.2 *Proposed Action/Project:* The beginning of the document should briefly describe the proposed federal action and tribal project. It should contain enough information so as to be understandable to individuals who are not familiar with the proposed action/project.

4.10.3 *Purpose and Need:* This section should clearly identify the problem facing the Tribe proposing the action (that is, what is the need for the proposed action/project), the purpose of the action/project (that is, how

will the proposed action/project solve the problem of Tribe). A timeframe for implementation of the proposed action/project should also be included, if known. The purpose and need for the proposed action should be justified and defined in terms that are understandable to individuals who are not familiar with needs of Native American tribes. Any references to supporting data, studies, or other analyses can be incorporated by reference, so long as they meet the requirements established in Section 4.9.6.

4.10.4 *Alternatives:* The alternatives evaluated in the EA are those that will be considered by the NIGC approving official. The alternatives have to provide the NIGC approving official sufficient information to demonstrate a reasoned decision has been made. At a minimum, the alternatives evaluated in an EA must evaluate the proposed action, a no-action alternative, other reasonable alternatives, and alternatives that were considered but not fully evaluated. The number of reasonable alternatives evaluated will be determined by the number of alternatives that can meet the purpose and need. Alternatives that were considered but not fully evaluated are those alternatives that either do not meet the purpose and need or are unreasonable from an implementation stand-point. Examples of alternatives that are unreasonable from an implementation stand-point include but are not limited to those for which construction costs are unreasonable, proposals on lands that do not and cannot reasonably be made to qualify for Indian gaming, and those for which preliminary environmental screening has identified an insurmountable barrier (e.g. Corps of Engineers' unwillingness to issue a CWA § 404 permit). Discussions of these alternatives should articulate why each alternative was considered and eliminated or retained for further analysis. At a minimum, the alternatives section should contain the following:

4.10.4.1 A list of all alternatives considered, including the proposed action and the no-action alternative and those not retained for further analysis. For each alternative, any connected actions or cumulative impacts should be considered.

4.10.4.2 A statement identifying the Tribe's preferred alternative, and the NIGC's preferred alternative (if one has been identified).

4.10.4.3 A statement explaining why any alternatives were considered and eliminated from further study.

4.10.4.4 A visual depiction (using photos, GIS, other sources) of each alternative, if appropriate, to aid understanding of the alternatives. This should include but is not limited to aerial photos and/or maps showing project locations, GIS figures showing detailed information, and CADD depictions showing project site layouts.

4.10.5 *Affected Environment*: The “Affected Environment” section should succinctly describe the existing environmental conditions of the potentially affected geographic areas. The geographic areas described in this section may vary depending on the anticipated impacts (e.g. the socioeconomic geographic area may be larger than the geographic area described for noise impacts). The descriptions provided in this section should be commensurate with the potential for impact and importance of that aspect of the environment. Where appropriate, the use of GIS and other mapping tools should be used to avoid superfluous written descriptions. The items to be included in this section may include but are limited to the following:

4.10.5.1 Location map, vicinity map, project layout plan, and photographs.

4.10.5.2 Existing and planned land uses and zoning, including: descriptions of industrial and commercial growth characteristics in the affected area; affected residential areas, schools, churches, hospitals, public parks and recreational areas, wildlife/waterfowl refuges; areas with known or suspected federal or state threatened or endangered species or critical habitat; wetlands; floodplains; farmlands; coastal zones/barriers; federal or state wild and scenic rivers; and historic/cultural/archeological sites listed or eligible for listing on the National Register of Historic Places.

4.10.5.3 Political jurisdictions that may be affected by the proposed action.

4.10.5.4 Population estimates and other demographic information.

4.10.6 *Environmental Consequences*: The EA must evaluate the environmental consequences that will be the result of the no-action alternative, the proposed action, and any other reasonable alternatives that were retained for further analysis. The evaluation must provide enough information on and evidence of the environmental consequences for each alternative being evaluated so as to allow the NIGC to determine whether to prepare an EIS or a FONSI. The environmental consequences section must provide analysis that the NIGC determines to be sufficient to address the significance factors (See 40 CFR 1508.27). The analysis should focus on those resource categories that will be directly, indirectly, and cumulatively impacted by the proposed action. At the beginning of this section and if applicable, the EA should note those resource categories that will not be impacted by the proposed action, the no-action, and other alternatives retained for further analysis. It is appropriate to incorporate by reference background data to support the environmental consequences analysis.

4.10.6.1 The results of the analysis must include the adverse effects that cannot be avoided and mitigation measures necessary to reduce the environmental consequences to a level below the significance threshold if the proposed action is implemented. This section should not duplicate the information contained in the Alternatives section. Information in this section should contain the following for each alternative retained for further analysis:

4.10.6.1.1 Direct effects and their significance;

4.10.6.1.2 Indirect effects and their significance;

4.10.6.1.3 Cumulative effects and their significance (this analysis should evaluate the effects of the proposed action when combined with other past, present, and reasonably foreseeable actions taken by either another federal, tribal, state, local, or private entity. For additional information on properly analyzing the cumulative effects, refer to CEQ guidance "Considering Cumulative Effects Under the National Environmental Policy Act," issued January 1997.)

4.10.6.1.4 Any possible conflicts between the proposed action and the objectives of federal/state/local and other tribal plans, policies, and controls in the affected area;

4.10.6.1.5 Unresolved conflicts.

4.10.6.2 The proposed action, the no-action alternative and each alternative retained for further study must be analyzed for environmental consequences to each of the resource categories contained in Appendix A "Environmental Resource Categories." If required and as a matter of practice, the NIGC supports the issuance of permits and approvals for a proposed action with or shortly after the issuance of the Final EA and FONSI. In order to facilitate this, the responsible NIGC official shall: (1) participate in coordination efforts with other federal, tribal, state and/or local agencies or organizations, (2) identify information needed by other federal, tribal, state and/or local agencies or organizations, and (3) integrate items (1) and (2) into the EA process.

4.10.7 *Mitigation:* Any mitigation measures included in the EA must be reasonable and should contain enough detail to describe the benefits of the proposed mitigation measure. Mitigation measures should only be included after consultation with the federal, tribal, state or local agency or organization that has jurisdiction over the resource being impacted. Mitigation measures should be considered when it will reduce or eliminate significant impacts. Any proposed mitigation measure should describe

how it will reduce or eliminate the impact(s) and if the resulting impacts are significant. If mitigation is proposed to reduce impacts below the appropriate level of significance, an EIS is not required, provided that:

- 4.10.7.1 The agency took a “hard look” at the environmental impacts.
- 4.10.7.2 The agency identified the relevant areas of environmental concern.
- 4.10.7.3 The EA supports the agency’s determination that potential impacts are not significant.
- 4.10.7.4 The agency has identified mitigation measures that will be sufficient to reduce potential impacts below the threshold of significance and has obtained commitments from the Tribe to implement those measures.

4.10.8 *List of Prepares:* The EA shall contain a list of names and qualifications of personnel (NIGC, Cooperating Agency, Tribal representatives, consultants and sub-consultants) who prepared the EA. The list should include individuals responsible for analysis, review and comment, and other background information that is included or referenced.

4.10.9 *List of Agencies and Persons Consulted:* The EA shall include at a minimum those federal, tribal, state and local agencies and organizations with whom the consultation or coordination was done.

4.10.10 *Appendixes:* The EA should include the following appendixes, as appropriate:

4.10.10.1 Documentation that supports or evidences conclusions, references, and methodologies.

4.10.10.2 Documentation that supports or evidences consultation and/or coordination with federal, tribal, state and/or local agencies and organizations. This documentation may take the form of comments provided on the EA, letters/other correspondence, and/or meeting minutes.

4.10.10.3 Documentation that supports or evidences the public’s opportunity to participate in the development of the EA. This documentation may include but is not limited to, transcripts of public hearings, sign-in sheets from public workshops, and comment letters received during the public’s review period.

#### **4.11 FINDING OF NO SIGNIFICANT IMPACT (FONSI)**

4.11.1 *Purpose:* The purpose of an EA is to support the NIGC's determination that the proposed action does or does not have the potential to create significant impacts. If none of the potential impacts are likely to be significant, the responsible NIGC official shall prepare or have prepared a "finding of no significant impact" (FONSI), which will briefly present, in writing, the reasons why the proposed action will not have a significant impact on the human environment. The NIGC Chairman shall make the final decision whether to approve the FONSI. Approval of a FONSI signifies that the NIGC will not prepare an EIS and has completed its NEPA documentation for the proposed action. Approval of a FONSI does not mean that the NIGC has decided to take the proposed federal action. Instead, it only means that the NIGC found the proposed action will not have a significant impact on the environment (See Section 4.10.6).

4.11.2 *Scope:* While there is no particular format for a FONSI, it must contain all the information noted in 40 CFR 1508.13.

4.11.2.1 It is recommended that the FONSI be either attached to the EA or it may be combined with the EA to create a single document. In this case, the FONSI should incorporate EA information by reference instead of repeating it. However, the FONSI must include a brief description of the proposed action, the purpose and need, alternatives considered (to include the no-action alternative), those impacts for which mitigation is proposed, and the NIGC's findings that resulted from the EA. The FONSI shall document relevant material necessary to support the conclusion that the action is not a major federal action significantly affecting the human environment. The degree of detail contained in the FONSI shall be commensurate with the complexity of the proposed action. Specifically, the detail will vary according to the nature, scale, and location of the proposed project, and the resulting complexity and degree of impact. A FONSI may range from a simple conclusion, supported with just the pertinent facts, that the action is not a major federal action significantly affecting the quality of the human environment, to an in-depth analysis of the environmental impacts and proposed mitigation similar to that contained in the EA.

4.11.2.2 If the FONSI is not attached or combined with the EA, the FONSI must include a summary of the EA and note any other environmental documents related to it.

4.11.2.3 The FONSI shall determine the proposed action's consistency or inconsistency with community planning, and shall document the basis for the determination.

4.11.2.4 The FONSI shall present any measures required to mitigate adverse impacts on the environment and which are a condition of the decision to forego the preparation of an EIS. The FONSI should also reflect coordination of proposed mitigation commitments with, and consent and commitment from, those with the authority to implement specific mitigation measures committed to in the EA and FONSI.

4.11.2.5 The FONSI shall reflect compliance with applicable environmental laws and requirements, including interagency and intergovernmental coordination and consultation, public involvement, and documentation. The FONSI shall also contain findings and determinations required under special purpose environmental laws, regulations, and executive orders, if not made in the EA.

4.11.3 *Internal Review Process and Approval:*

4.11.3.1 The responsible NIGC official will coordinate the review of the FONSI with the NIGC's Office of General Counsel. The FONSI may be reviewed by other NIGC personnel, when necessary.

4.11.3.2 Each FONSI shall include the following at the end of the document:

Recommendations/Approvals

After careful and thorough consideration of the facts contained herein, the undersigned finds that the proposed federal action is consistent with existing national environmental policies and objectives as set forth in Section 101 of the NEPA and other applicable environmental requirements and will not significantly affect the quality of the human environment or otherwise include any condition requiring consultation pursuant to Section 102(2)(c) of NEPA.

*Environmental Assessment and FONSI reviewed and recommended by:*

\_\_\_\_\_  
[Name]  
NIGC NEPA Compliance Officer

\_\_\_\_\_  
Date

*Approved by:*

\_\_\_\_\_  
[Name]  
NIGC Chairman

\_\_\_\_\_  
Date

4.11.4 *Agency Distribution:* A copy of the FONSI and EA shall be sent to reviewing agencies and organizations or individuals that made substantive comments or specifically requested copies. When a project impacts a resource protected under a special purpose law or administrative directive (e.g. Section 7 of the Endangered Species Act), the responsible NIGC official shall send a signed copy of the FONSI and the EA supporting it to the agency(ies) with whom the NIGC consulted to comply with the applicable law or directive.

4.11.5 *Public review:* In some cases, it may be appropriate to give the public an opportunity to review the final EA/FONSI before the agency takes its action. (See also CEQ's "40 Most Asked Questions," number 37b). When one of the following circumstances exists, the final EA/FONSI will be made available to the public for a minimum of 30 days:

4.11.5.1 The proposed action is, or is closely similar to, one normally requiring the preparation of an EIS;

4.11.5.2 The nature of the proposed action is one without precedence;

4.11.5.3 A special purpose environmental law, regulation, or executive order requires public notice of specific findings or determinations apart from the FONSI.

4.11.6 *Internal Distribution:* The FONSI and EA shall be kept on file with the NIGC and sent to the National Records Center in accordance with the NIGC records retention policy.

4.11.7 *Public Availability:* In accordance with CEQ regulations, the NIGC shall make the FONSI available to interested or affected persons or agencies (See 40 CFR 1506.6). When the FONSI is made available, a notice of availability shall be made public using the appropriate method, as defined by 40 CFR 1506.6(b). The announcement will identify the location(s) where the FONSI and final EA may be reviewed. Copies of the FONSI and final EA will be provided upon request, free of charge or at a fee commensurate with the cost of reproduction.

## **4.12 MONITORING MITIGATION**

4.12.1 In accordance with 25 CFR §531.1(b)(16), a pending management contract will assign either the tribe or casino manager the responsibility to supply the NIGC with all information necessary for the NIGC to comply with NEPA. This shall include documentation that all mitigation and other conditions established in the final EA and FONSI, or in agreements



with state/local agencies or organizations, and included as a condition of the project approval, have been implemented.

#### **4.13 DECISION DOCUMENTS FOR FINDINGS OF NO SIGNIFICANT IMPACT**

- 4.13.1 Immediately following the approval of a FONSI, except in the circumstances identified in Section 4.11.5, the NIGC decisionmaker may decide whether to take the proposed action. Mitigation measures that were made a condition of the approved FONSI and the steps taken to assure appropriate commitment and follow-up shall be incorporated in the decision to implement the action.

#### **4.14 TIERING AND PROGRAMMATIC ENVIRONMENTAL ASSESSMENTS**

- 4.14.1 The concept of tiering for EISs may also be applied to EAs. The responsible NIGC official may elect to prepare a tiered document from a completed EA or EIS if the official finds that the selected EA or EIS is current and meets NIGC requirements. Permitting and review agencies may have independent requirements for review of the previously prepared documents.

#### **4.15 WRITTEN RE-EVALUATIONS**

- 4.15.1 The preparation of a new FONSI is not necessary when it can be documented that the:

4.15.1.1 Proposed action conforms to plans or projects for which a prior FONSI has been issued;

4.15.1.2 Data and analyses contained in the previous EA and FONSI are still substantially valid; and

4.15.1.3 All pertinent conditions and requirements of the prior approval(s) have been, or will be, met in the current action.

- 4.15.2 An evaluation, signed by the responsible NIGC official, or a letter documenting the evaluation, will either conclude that the contents of the previously prepared environmental document(s) remains valid or that significant changes require the preparation of a supplemental or new EA.

- 4.15.3 The written re-evaluation will be reviewed by the NIGC's Office of General Counsel.

#### **4.16 REVISED OR SUPPLEMENTAL ENVIRONMENTAL ASSESSMENTS OR FONSIs**

- 4.16.1 The NIGC will prepare or have prepared supplements to an EA if there are substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Significant information is information showing dramatic changes to the impacts of the proposed project compared to those identified in the original EA. The agency may also prepare or have prepared supplements when the purposes of NEPA will be furthered by doing so.
- 4.16.2 Supplemental documents will be prepared and circulated in accordance with the procedures of this chapter.
- 4.16.3 When a supplement EA is prepared, a new FONSI must be issued.

#### **4.17 Review/Comment on EAs prepared by other Agencies:**

- 4.17.1 *Comments:* Federal, tribal, state and local agencies/organizations may review and comment on the draft and final EA. When comments are submitted to the NIGC, they should be specific in nature and organized in a manner consistent with the structure of the draft or final EA and may identify modifications that might enhance environmental quality or avoid or minimize adverse environmental impacts, and will correct inaccuracies or omissions. Comments will be submitted within the time limits set forth in the request, unless the agency/organization responsible for submitting comments seeks and receives an extension from the responsible NIGC official.

#### **4.18 Reserved**

## CHAPTER 5: Environmental Impact Statements and Records of Decision

**5.1 Introduction:** The purpose of this chapter is to provide guidance on the process and preparation of an Environmental Impact Statement (EIS) and Record of Decision (ROD). The EIS shall provide environmental impact information, including required or agreed to mitigation measures, to the decisionmaker and the public. The two main differences between an EIS and an EA are the level of analysis conducted and the formalities regarding public participation.

**5.2 Roles and Responsibilities of the EIS Team:** The EIS team has several key personnel. The following section will outline the roles and responsibilities of each member of the team.

**5.2.1 Lead Federal Agency:** The Lead Federal Agency for Indian gaming projects will either be the National Indian Gaming Commission (NIGC) or the Cooperating Agency. When the Cooperating Agency is the Lead Federal Agency, the Cooperating Agency will be responsible for directing the preparation of the EIS. When the NIGC is the Lead Federal Agency, the NIGC shall assume the following roles and responsibilities:

5.2.1.1 Serve as the Project Manager for the preparation of the EIS and ROD;

5.2.1.2 Select an EIS consultant (See Appendix C);

5.2.1.3 Prepare the EIS/ROD and all supporting documents;

5.2.1.4 Consult with agencies responsible for special purpose laws or administrative directives;

5.2.1.5 Ensure that the analysis contained in the EIS/ROD complies with NEPA.

**5.2.2 Cooperating Agency(ies):** A cooperating agency is “any Federal agency... which has jurisdiction by law or special expertise with respect to any environmental impact...” (40 CFR §1508.5). This definition also goes on to say that “a State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe” may be a cooperating agency. When cooperating agencies are identified, a Memorandum of Understanding will be prepared to outline their roles and responsibilities (See MOU Example in Appendix B). In addition to those roles and responsibilities,

each cooperating agency shall be responsible for ensuring the content of the EIS meets their own NEPA compliance procedures.

5.2.3 *EIS Consultant:* The EIS consultant will be responsible for the preparation of the EIS. The EIS consultant will prepare the EIS at the direction of the Lead Federal Agency (for the purposes of this Manual, the NIGC).

5.2.4 *Tribe:* The individual tribe proposing a project will be responsible for providing information needed for the preparation of the EIS. Information shall include, but is not limited to, a detailed description of the proposed project and potential alternatives to the proposed project. In addition, the Tribe should appoint a Tribal Point of Contact (POC). The POC shall serve a liaison between the Tribe and the rest of the EIS team. When appropriate, the Tribe may also act as a Cooperating Agency.

### **5.3 Actions normally requiring an Environmental Impact**

**Statement:** An EIS is required when a major federal action will significantly affect the quality of the human environment.

5.3.1 Significance is defined in terms of context and intensity (See below).

5.3.1.1 **Context:** The significance of an action must be analyzed in several contexts, such as society as a whole (human, national), the affected region, the affected interests, and the locality. The context or contexts in which the analysis is performed will vary depending on the proposed action. For example, if the proposed action and/or its impacts are expected to be contained within a local area, the evaluation of significance will usually depend on the effects within that local area rather than across the state or country. However, in some cases it may be necessary to look outside the local area.

5.3.1.2 **Intensity:** Intensity refers to the severity of the impact. The following should be considered in evaluating intensity:

5.3.1.2.1 Impacts may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on the balance the effect will be beneficial.

5.3.1.2.2 The degree to which the proposed action affects public health and/or safety.

5.3.1.2.3 Unique characteristics of the geographic areas such as proximity to historic or cultural resources, park lands, prime farmlands, wild and scenic rivers, or ecologically critical areas.

5.3.1.2.4 The degree to which the effects on the quality of the human environment are likely to be highly controversial.

5.3.1.2.5 The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

5.3.1.2.6 The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about future consideration.

5.3.1.2.7 Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulative significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts (this is called segmentation).

5.3.1.2.8 The degree to which the action may adversely affect districts, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources.

5.3.1.2.9 The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

5.3.1.2.10 Whether the action threatens a violation of federal, tribal, state, or local law or requirements imposed for the protection of the environment (40 CFR 1508.27).

5.3.2 If an EA was prepared for a proposed action, and based on that analysis, it was determined that one or more of its impacts would be significant, an EIS must be prepared. The EA that was prepared should then be used in the scoping process described below.

5.3.3 If the responsible NIGC official, based on his or her professional judgment, has determined that a proposed action has the potential to cause significant impacts, he or she may elect to prepare an EIS without first preparing an EA.

5.3.4 The addition of mitigation to reduce impacts below significance may avoid the requirement to prepare an EIS. If mitigation is integrated into the design

of the proposed action, or if through scoping or the EA process the proposed action is redefined to include mitigation, or if all potentially significant impacts are mitigated below the appropriate thresholds of significance, then the responsible NIGC official may rely on the mitigation measures in determining that the overall effects would not be significant and prepare an EA/FONSI. See Section 4.11.5.

5.3.5 Following the preparation of an EA or if it has been determined to prepare an EIS without first preparing an EA, an EIS must be prepared when the federal action has the potential to cause:

- 5.3.5.1 a significant adverse effect on cultural or historic resources pursuant to the National Historic Preservation Act of 1966, as amended;
- 5.3.5.2 a significant impact on natural, ecological, or scenic resources of federal, tribal, state or local significance (e.g., federally listed or proposed endangered, threatened, or candidate species, or designated or proposed critical habitat); resources protected by the Fish and Wildlife Coordination Act; wetlands; floodplains; coastal zones; prime or unique state or locally important farmlands; energy supply and natural resources; and wild and scenic rivers;
- 5.3.5.3 a substantial division or disruption of an established community or planned development, or is likely **not** to be reasonably consistent with plans or goals that have been adopted by the community in which the proposed project is to be located;
- 5.3.5.4 a significant increase in congestion from surface transportation (by causing a decrease in the Level of Service (LOS) below acceptable levels determined by an appropriate transportation agency, such as a highway agency);
- 5.3.5.5 a significant increase in noise levels on noise-sensitive areas;
- 5.3.5.6 a significant impact on air quality or a violation of federal, tribal, state or local air quality standards under the Clean Air, as amended;
- 5.3.5.7 a significant impact on water quality or sole source aquifers, or contamination of a public water supply system, or a violation of state or tribal water quality standards established under the Clean Water Act and the Safe Drinking Water Act;
- 5.3.5.8 a violation of any federal, tribal, state, or local law relating to the environmental aspects of the proposed action;

- 5.3.5.9 a significant (direct or indirect) impact on the human environment, including, but not limited to, actions likely to cause a significant lighting impact on residential areas or business properties, or likely to cause a significant impact on the visual nature of surrounding land uses.

**5.4 Impact Categories:** Appendix A of this manual identifies the environmental impact categories that the NIGC examines for its actions under NEPA. It should be noted that the list of impact categories in Appendix A is not exhaustive. In some circumstances, additional impact categories may need to be added. It is recommended that prior to conducting analysis under any of these categories, the responsible NIGC official be consulted regarding methodologies, thresholds of significance, mitigation measures, and permitting.

### 5.5 Environmental Impact Statement Process Overview:

When a determination has been made to prepare an EIS, the following Figure provides an overview on the EIS process.

**Figure 5-1 The Environmental Impact Statement Overview**

<b>Step 1</b>	Responsible NIGC official or applicant formulates a proposed action and a preliminary range of alternatives.
<b>Step 2</b>	Responsible NIGC official or applicant collects background data and analyzes information.
<b>Step 3</b>	Responsible NIGC official or applicant determines the need for an EIS (anticipated significant impact).
<b>Step 4</b>	Notice of Intent (NOI) published in <i>Federal Register</i> and local press.
<b>Step 5</b>	Initiate scoping activities, inviting participation of affected agencies and interested persons to aid in determining issues and alternatives to be addressed.
<b>Step 6</b>	Perform the environmental analyses
<b>Step 7</b>	Prepare a draft EIS
<b>Step 8</b>	Circulate copies of draft EIS to the public and other federal, tribal, state and local agencies/organizations for review and comment.
<b>Step 9</b>	Publish a Notice of Availability (NOA) in the <i>Federal Register</i> and file with EPA.
<b>Step 10</b>	Provide a public comment period for the draft EIS (45 day minimum).
<b>Step 11</b>	Responsible NIGC official receives and evaluates comments. Comment periods may be extended (See Section 5.7.1).
<b>Step 12</b>	Revise draft EIS after consideration of public comments.
<b>Step 13</b>	Make copies of final EIS or Executive Summary available to public, to include commentors.
<b>Step 14</b>	Publish NOA of final EIS in <i>Federal Register</i> and file with EPA.

<b>Step 15</b>	Responsible NIGC official must wait a minimum of 30 days to allow for review by EPA and possible referral to CEQ (See Section 5.17.1), or allow for requests of reconsideration or technical corrections, or for appeals under a lead agency's formal administrative appeals process.
<b>Step 16</b>	Responsible NIGC official prepares, or directs to be prepared, a Record of Decision (ROD).
<b>Step 17</b>	NIGC approving official signs the ROD, takes or approves the federal action, and has the ROD published.

## **5.6 Additional EIS process information:**

5.6.1 *Notice of Intent and Notice of Availability:* A Notice of Intent (NOI) must be prepared when it has been determined that an EIS must be prepared. The information that must be included in an NOI can be found in Figure 5-2. If a scoping hearing is planned and sufficient information is available at the time, the NOI should also announce the meeting, including the time and place of the meeting. The scoping meeting can also be announced separately. If the scoping meeting is being used to satisfy requirements of another environmental law/regulation, or executive order in addition to NEPA, the NOI should include a statement to that effect with a reference to the specific law, regulation, or executive order. It is highly recommended that other forms of publication (other than the *Federal Register*) be sought out to publish the NOI (40 CFR 1506.6).

5.6.1.1 The responsible NIGC official shall prepare the NOI in accordance with *Federal Register Document Drafting Handbook*. Once the NOI has been reviewed by the appropriate OGC attorney and the NIGC's Director of Contracts, three copies of the NOI will be sent to the Chairman for his signature. Upon receipt of the signed copies, the responsible NIGC official will send a cover letter, the three signed copies and a copy on a computer disc to: Director, Office of the Federal Register, National Archives & Records Administration, 800 North Capital, Suite 700, Washington D.C. 20001.

5.6.1.2 While preparing the NOI for publication in the Federal Register, the responsible NIGC official will begin working with the consultant selected to prepare the EIS and the Tribe proposing the action to establish an EIS approach strategy, EIS schedule and EIS management framework.

5.6.1.3 A Notice of Availability (NOA) is used to announce the availability of either the draft EIS or the final EIS. The draft or



final EIS is filed with the U.S. Environmental Protection Agency (EPA) and the EPA prepares and publishes a NOA. The NIGC may publish its own NOA in the Federal Register, but this is not mandatory. For additional information regarding filing an EIS, check the EPA website (<http://www.epa.gov/compliance/nepa/index.html>). Finally, the NOA should be published in local newspaper(s).

**Figure 5-2: NOI/NOA Information**

Purpose	<ul style="list-style-type: none"> <li>• Notice of Intent (NOI) announces to the public that the EIS process has begun for a proposed NIGC action.</li> <li>• If appropriate, the NOI announces the availability of a scoping document (or a previously prepared EA).</li> <li>• The NOI announces the scoping meeting, if one is planned, to include time and place. A separate notice can be prepared if the details of the scoping meeting(s) are unknown.</li> <li>• NOI must be published at least 15 days in advance of the scoping meeting(s).</li> <li>• Notice of Availability (NOA) announces availability of a draft EIS or final EIS.</li> </ul>
Content	<ul style="list-style-type: none"> <li>• Proposed action and possible alternatives</li> <li>• Proposed scoping process including whether, when, and where scoping meeting will be held.</li> <li>• Identifies the NIGC point of contact for public inquiries.</li> <li>• Announces availability of draft or final EIS (NOA only).</li> <li>• Provides information about where to review copies and send comments (NOA only).</li> </ul>
Public Participation	<ul style="list-style-type: none"> <li>• The NIGC and tribe or consultant publishes NOI in the <i>Federal Register</i> and local newspaper(s), respectively.</li> <li>• NOI or other notice of scoping should be published at least 15 days prior to the scoping meeting.</li> <li>• EPA drafts and publishes the NOA in the <i>Federal Register</i>.</li> <li>• NIGC may draft and publish an NOA in the <i>Federal Register</i>.</li> <li>• Tribe or Consultant should publish NOA in the local newspaper(s).</li> </ul>

5.6.2 *Scoping*: The scoping process is used to identify the environmental issues that should be considered during the EIS process. In addition, the scoping process should be used to help identify other reasonable alternatives. While there is no formal scoping process outlined in the CEQ regulations, 40 CFR

1501.7 does describe the general requirements to be achieved by the scoping process.

5.6.2.1 In cases where an EA has been prepared and the impacts of the proposed project were determined to be significant, the EA shall be the basis for which to move forward in the EIS scoping process.

5.6.2.2 The responsible NIGC official will lead the scoping process. This includes, but is not limited to, inviting or have invited all potentially affected federal, tribal, state and local agencies, organizations and/or other interested parties, determining issues to be analyzed in depth, identifying other environmental review and consultation requirements, and assigning responsible lead and cooperating agencies for input to the EIS. In some cases, a scoping meeting may be appropriate and would provide an opportunity to present additional information on the proposed project and solicit input from those interested and affected parties to:

5.6.2.2.1 Determine the scope of analysis required within the EIS;

5.6.2.2.2 Identify and eliminate insignificant issues and those covered in previous environmental reviews;

5.6.2.2.3 Identify alternatives; and

5.6.2.2.4 Identify any other EAs or EISs that are being or will be prepared which are related, but are not part of the scope of the EIS under consideration.

5.6.2.3 Scoping is the point at which substantial efforts should be made to begin the consultation process with local governmental bodies, federal and state agencies, and other tribes which may be affected the by the proposed project.

5.6.3 *Preparation of the EIS (Format):* The NIGC preferred format follows the format found in 40 CFR §1502.10 and is outlined below. A summary is presented in Figure 5-3.

5.6.3.1 **Cover sheet:** The cover sheet shall include a title (project name, location, and tribe); the name of each responsible agency (lead and cooperating); lead agency point of contact information; designation of the document as draft or final (prior to the document being released to the public in draft form, it will be designated as a "Preliminary Draft EIS Version XX"); an abstract paragraph

briefly describing the project; and the date in which comments are due.

- 5.6.3.2 **NIGC Declaration Page:** This section shall contain the project title, location, “Final Environmental Impact Statement”, legal authority citation (National Environmental Policy Act, 42 U.S.C. §4332(2)(C); Indian Gaming Regulatory Act, 25 U.S.C. §2711), the month and year the Final EIS was available, “Lead Agency: National Indian Gaming Commission,” cooperating agencies, an abstract containing project description and EIS process, and the required environmental findings and conclusions.
- 5.6.3.3 **Table of Contents:** The table of contents should list where to find each chapter, figures, maps, tables, a glossary, references, and appendixes.
- 5.6.3.4 **Executive Summary:** The Executive Summary shall summarize the information in the EIS. It shall focus on the primary conclusions, areas of interest to other agencies and the public, and issues resolved (emphasis on the alternatives studied).
- 5.6.3.5 **Purpose and Need:** The purpose and need for a proposed project has two parts. The ‘need’ identifies what the Tribe proposing the project lacks or what they need. The ‘purpose’ identifies that which the Tribe wants to obtain to satisfy its ‘need.’ For example, if a tribe lacks sufficient revenues to pay for essential governmental services, then the tribe’s “need” for the project may be to generate funds for essential governmental programs. The tribe’s “purpose” may be to enter into a management contract with a casino developer to construct and manage a casino that will generate sufficient revenues to provide essential governmental services for tribal members.
- 5.6.3.6 **Alternatives (including the proposed action and the no-action alternative):** Based on information from the ‘Affected Environment’ and ‘Environmental Consequences’ sections, the alternatives section should “rigorously explore and objectively evaluate all reasonable alternatives....” (See 40 CFR 1502.14(a)). In conducting this evaluation, it is recommended that screening criteria be developed to identify those alternatives that will not be studied in detail. For example, if a proposed action (with the exception of the no-action alternative) will not meet the ‘Purpose and Need’, it should not be studied in detail and would not be evaluated in the ‘Environmental Consequences’ section. However, if an alternative were to partially meet the ‘Purpose and Need’, it may be determined that the alternative should be evaluated in the

‘Environmental Consequences’ section. When screening potential alternatives, the NIGC, cooperating agencies, the Tribe proposing the project and the EIS consultant should work to identify appropriate screening factors. The NIGC’s preferred alternative may be noted in the draft EIS, if one exists. Otherwise, the NIGC’s preferred alternative shall be identified in the final EIS unless prohibited by another law.

**5.6.3.7 Affected Environment:** This section of the EIS will describe the existing conditions in and around the area of each alternative. This section should provide enough information to understand the potential effects the alternatives will have on particular resources. The amount of information provided in this section and its sub-sections should be commensurate with the significance of the potential impacts. The area to be described is not limited to the immediate project area and will vary depending on the particular resource category being described. For example, if the project’s construction site is the only area that will experience a change in land use and all surrounding land uses are compatible, there would be no need to expand the land use description beyond the boundaries of the project site. However, if as part of the proposed project a waste water treatment plant will require discharge to a particular stream and that stream is tributary to another larger body, it may be necessary to expand the water quality description several miles from the project site. The NIGC, cooperating agencies, the Tribe proposing the project and the EIS consultant should work collectively to identify appropriate ‘Affected Environment’ boundaries.

**5.6.3.8 Environmental Consequences:** This section should first describe the methodology used to evaluate the potential impacts to each particular resource category being evaluated. That methodology should be applied to all of the alternatives selected to be studied in detail. The impacts identified for each alternative should then be presented in a manner that allows a comparative analysis of the impacts. This section should then identify those impacts that cannot be avoided; the relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and any irreversible or irretrievable commitments of resources which would be involved in the proposed project’s implementation. Direct, indirect, and cumulative impacts should be evaluated in this section. (Cumulative impacts may be included within each resource category or may be evaluated as a stand alone sub-section. In addition to the analysis and potential impacts, this section must also include information regarding the status of interagency,

intergovernmental consultation required by any special purpose environmental law(s), regulation(s), or executive order(s).

5.6.3.9 **Mitigation:** This section shall describe mitigation measures that were considered and planned to minimize environmental harm that may result from the proposed project. It is expected that the following types of mitigation will be included: design and construction actions to avoid or reduce impacts; design measures that reduce impacts; management actions that reduce impacts during operation of the facility; and replacement, restorations (reuse, conservation, preservation), and compensation measures. In accordance with 25 CFR §531.1(b)(16), the management contract (if approved) will assign either the Tribe or Casino Manager the responsibility to “supply the National Indian Gaming Commission...with all information necessary for the Commission to comply with...the National Environmental Policy Act (NEPA).” This shall include, but is not limited to, documentation that all mitigation and other conditions established in the EIS and committed to in the ROD, or in agreements with state/local agencies or organizations, and included as a condition of the project approval, have been implemented.

5.6.3.10 **List of Preparers:** This section shall include a list of each person’s name and their qualifications (e.g. expertise, experience, professional disciplines) of the NIGC staff, cooperating agency(ies) staff, EIS consultant staff and sub-contractors staff who assisted in preparing the EIS or associated environmental studies.

5.6.3.11 **List of Agencies, Organizations, Person(s) to Whom and Locations Where copies of the EIS were sent:** This list is provided for reference purposes and to demonstrate that the EIS has been circulated and the public review process has been followed.

5.6.3.12 **Appendices:** This section consists of material that substantiates any analysis that is fundamental to the EIS and its conclusions, but would substantially contribute to the length of the EIS or detract from the document’s readability, if included in the body of the EIS. This section should contain information and documentation about formal and informal consultation conducted and related agreement documents prepared pursuant to other applicable environmental laws, regulations, and executive orders.

5.6.3.13 **Comments:** Comments received on the draft EIS are assessed and responded to in the final EIS in any or all of the following ways:

5.6.3.13.1 Written into the text of the final EIS;

5.6.3.13.2 Stated in an errata sheet attached to the final EIS;

5.6.3.13.3 Included or summarized and responded to in an attachment to the final EIS, and if voluminous, may be compiled in a separate supplemental volume for reference.

Figure 5-3: Environmental Impact Statement Content

Purpose	<ul style="list-style-type: none"> <li>• Provide an in-depth review of environmental impacts for all major NIGC actions before a decision is made.</li> <li>• Examines a reasonable range of alternatives to the proposed action.</li> <li>• Discloses to the public and the decisionmaker the alternatives, impacts, and mitigation.</li> </ul>
Scope	<ul style="list-style-type: none"> <li>• Provide a comprehensive review of all impacts of the proposed action and alternatives, including a no-action alternative.</li> </ul>
Content	<p>Include the following:</p> <ul style="list-style-type: none"> <li>• Cover sheet</li> <li>• Table of Contents</li> <li>• Executive Summary</li> <li>• Purpose and Need</li> <li>• Alternatives considered, including the proposed action and the no-action alternative.</li> <li>• Affected Environment</li> <li>• Environmental Consequences</li> <li>• Mitigation</li> <li>• Coordination and Consultation</li> <li>• List of Preparers</li> <li>• Appendices</li> <li>• Summary of Public comments</li> </ul> <p>Changes to this format must be approved by the NIGC.</p>
Public Participation	<ul style="list-style-type: none"> <li>• Provide for 60-day comment period on the draft EIS.</li> <li>• Hold at least one (1) public hearing.</li> <li>• Provide a 30-day waiting period following the publication of the final EIS before issuing the ROD.</li> </ul>

## 5.7 Timing of Actions:

5.7.1 While the minimum comment period for the draft EIS is 45 days (40 CFR 1506.10(c)), the NIGC has chosen to provide a 60-day draft EIS comment

period. A public hearing shall not be held sooner than 15 days following publication of the notice of availability (NOA). The NIGC's final record of decision (ROD) on the proposed action cannot be made until 90 days after the filing of the draft EIS (40 CFR 1506.10(b)(1)) and 30 days after filing of the final EIS. If another federal agency provides a showing of compelling reasons regarding national policy to the U.S. EPA, the EPA may extend the comment period after consultation with the lead federal agency. If the lead federal agency does not concur with the extension proposed by EPA, the EPA cannot extend the time period for more than 30 days. The NIGC may issue its own detailed NOA in addition to the NOA published by the EPA. However, a NOA issued by the NIGC cannot substitute for the NOA issued by the EPA. If the NIGC decides to extend the comment period, the EPA must be notified so it may modify its *Federal Register* notice accordingly.

- 5.7.2 In order to have the EPA publish a NOA, the NIGC shall send five (5) copies to the U.S. Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Mail Code 2252-A, Room 7241, 1200 Pennsylvania Ave., NW, Washington D.C. 20460. (**Special Note:** For all deliveries by courier, including express delivery services other than the US Postal Service, use 20004 as the zip code.) The responsible NIGC official should access the "NEPA" website of the EPA's Office of Federal Activities to verify that the filing instructions provided herein are current (<http://www.epa.gov/compliance/nepa/>).

## **5.8 Draft EIS**

- 5.8.1 *Internal Review:* Prior to the releasing the draft EIS to the public and other agencies, the draft EIS will be prepared and reviewed by the NIGC, and all cooperating agencies. This version of the draft EIS will be designated as the "Preliminary draft EIS." This review is intended to ensure that the document is technically and legally sufficient. It is intended to assure that the concerns of NIGC and cooperating agencies are properly discussed in the document prior to its public release.

- 5.8.2 *Filing the DEIS:* Once the internal review is complete, the document should then be designated as the "draft EIS" and sent to the US EPA at the address in Section 5.7.2.

- 5.8.3 *Public Notice:* The responsible NIGC official shall ensure the draft EIS has been delivered to interested parties, appropriate libraries, and other public venues that provide the public an opportunity to review and comment on the draft EIS.

- 5.8.3.1 Once delivery to appropriate public venues has been confirmed, the responsible NIGC official shall attach a letter certifying such delivery to the five (5) copies to be sent to the EPA. The EPA will

normally publish the draft EIS NOA in the *Federal Register* two (2) weeks after receiving the NIGC's certification of distribution. Once delivered, it is recommended that the responsible NIGC official contact the EPA for the exact date that it will be published.

5.8.3.2 In addition to the NOA published in the *Federal Register*, the responsible NIGC official shall ensure that notice is also published via local media (e.g. local newspapers) and a press release from the NIGC media relations office. When publishing notices, every effort should be made to have them published on the same date the EPA's notice will be published.

5.8.3.3 The following standard language shall be used in its certification to EPA, local media, and the NIGC press release:

*The NIGC encourages all interested parties to provide comments concerning the scope and content of the draft EIS. Comments should be as specific as possible and address the analysis of potential environmental impacts and the adequacy of the proposed action or merits of alternatives and the mitigation being considered. Reviewers should organize their participation so that it is meaningful and makes the agency aware of the reviewer's interests and concerns using quotations and other specific references to the text of the draft EIS and related documents. Matters that could have been raised with specificity during the comment period on the draft EIS may not be considered if they are raised for the first time in the decision process. This commenting procedure is intended to ensure that substantive comments and concerns are made available to the NIGC in a timely manner so that the NIGC has an opportunity to address them.*

#### 5.8.4 Distribution and Coordination for Intergovernmental Review:

5.8.4.1 Comments from appropriate federal, tribal, state and local agencies and organizations that did not act as cooperating agencies shall be requested and accepted.

5.8.4.2 Copies of the draft EIS shall be sent to:

5.8.4.2.1 Appropriate federal, tribal, state and local agencies and organizations.

5.8.4.2.2 Regional EPA office with jurisdiction over the proposed project site. (1 copy)



5.8.4.2.3 If the proposed project occurs within a state that has an established clearinghouse, delivery of the draft EIS should follow the clearinghouse's procedures.

5.8.5 *Copies:* The responsible NIGC official shall have a sufficient number of draft EISs printed to meet the anticipated demand. Copies will be prepared for those agencies/organizations noted in Section 5.8.4.2 free of charge. A fee, not to exceed reproduction costs, may be charged for copies requested by the public if the original set of copies has been exhausted. Material used in developing or referenced in the draft EIS must be available for review at an NIGC designated location. Distribution of the draft EIS may be supplemented with copies in digital form (CDROM) and placing it on the internet.

5.8.6 *Comments:* The responsible NIGC official shall take into consideration all comments received from federal, tribal, state, local agencies and organizations, and the public. As a part of the consideration process, the NIGC official must respond to all substantive comments in the final EIS. Any comments on the draft EIS, including those made during the public hearing, shall accompany the final EIS through its internal review process. The draft EIS will be revised, as appropriate, to reflect comments received, and issues raised through the entire public involvement process. Copies of substantive comments shall be included in the final EIS or as a separate accompanying appendix. If the number of comments is too voluminous to include, the comments may be summarized.

## **5.9 Review and Approval of Final EIS**

5.9.1 As part of the EIS process, environmental issues are defined and mitigation measures identified. Any unresolved environmental issues and efforts to resolve them through further consultation will be identified and discussed in the final EIS. It shall reflect that there is compliance with the requirements of all applicable environmental laws, regulations, and executive orders. If compliance is not possible at the time the final EIS is prepared, the final EIS will reflect consultation with appropriate agencies and provide reasonable assurances that the requirements can be met. The required compliance must be completed prior to the NIGC issuing a ROD. All efforts should be made to complete compliance requirements during the final EIS to ensure meaningful public comment and to streamline the environmental review and permitting/approval processes.

5.9.2 *Internal Review:* This review shall follow the same format as that set out in Section 5.8.1. The internal review document shall be titled "Preliminary Final EIS."

### 5.9.3 Final EIS approval:

- 5.9.3.1 The following declaration shall be added to the NIGC Declaration page:

*After careful and thorough consideration of the facts contained herein and following consideration of the views of those federal agencies having jurisdiction by law or special expertise with respect to the environmental impacts described, the undersigned finds that the proposed federal action is consistent with existing national environmental policies and objectives as set forth in §101(a) of the National Environmental Policy Act of 1969.*

- 5.9.3.2 Signature and date blocks for the decisionmaker (the NIGC Chairman).

## 5.10 Notice of Availability of Final EIS

- 5.10.1 The Notice of Availability for the approved final EIS should follow the exact same process as that for the draft EIS (See §5.7.2 and 5.8.2).

## 5.11 Distribution of Approved Final EIS

- 5.11.1 Distribution of the approved final EIS shall follow the exact same process as that for the draft EIS (See §5.8.4).

## 5.12 Record of Decision

- 5.12.1 The ROD is the NIGC's decision document. The NIGC may not make a decision until 90 days after the draft EIS NOA and 30 days after the final EIS NOA were published.

- 5.12.2 The NIGC Chairman shall be responsible for signing all RODs.

- 5.12.3 Any mitigation measures contained in the final EIS must be included in the ROD. A monitoring and enforcement plan may be adopted to ensure compliance with all mitigation measures. Proposed changes to mitigation measures must be reviewed by the same federal, tribal, state, or local agencies/organizations that reviewed the final EIS and must be approved by the NIGC Chairman.

- 5.12.4 The NIGC Chairman may choose an alternative that was included in the final EIS but was not the environmentally preferred alternative(s) nor the

NIGC's preferred alternative identified in the final EIS. If the final EIS's preferred alternative is not selected, the federal, tribal, state and local agencies/organizations may need to be consulted to ensure that the selected alternative complies with special environmental laws, regulations, and executive orders. In some cases, a supplemental final EIS may be necessary and should be reviewed and approved in accordance with Section 5.16.

- 5.12.5 The ROD does not require a NOA to be published in the *Federal Register* unless the action is of national concern, but the ROD must be made available to the public. It is recommended that a NOA be published via local media (e.g. local newspapers) and the ROD be made available at local libraries or other public depository. The NOA and ROD also may be published and made available via other means (e.g. on the NIGC website or the project's individual website).

### **5.13 Tiering and Programmatic EISs:**

- 5.13.1 *Programmatic EISs:* Given that most NIGC actions that require an EIS are specific to individual tribes, it is not anticipated that a Programmatic EIS would be appropriate. Therefore, this section is reserved.

- 5.13.2 *Tiered EISs:* The purpose of a tiered EIS is to eliminate repetition and facilitate analysis of issues at the appropriate level of detail. For example, a tiered EIS may be appropriate when a tribe's proposed project is scheduled to occur over a lengthy period of time or there is a phased plan for the project implementation. More information regarding a tiered EIS can be obtained by consulting the responsible NIGC official.

### **5.14 Time Limits for EISs**

- 5.14.1 A draft EIS shall be assumed to be valid for a period of three (3) years. If the final EIS is not submitted to the responsible NIGC official within three (3) years from the date of draft EIS circulation, a written reevaluation (See Section 5.15) of the draft EIS will be prepared by or for the responsible NIGC official. If there have been significant changes that affect the NIGC's consideration of the proposal, a supplement to the draft EIS or a new draft EIS will be prepared and circulated.

- 5.14.2 A final EIS shall be assumed to be valid for a period of three (3) years. For a final EIS more than three (3) years old, the following conditions apply:

- 5.14.2.1 If major steps toward implementation of the proposed project/action (e.g. start of construction or land being taken into

trust by the Department of the Interior) have not commenced within three (3) years from the date of the final EIS approval, a written reevaluation (See Section 5.15) of the adequacy, accuracy, and validity of the final EIS will be prepared by or for the responsible NIGC official. If the responsible NIGC official determines that there have been significant changes that affect the NIGC's consideration of the proposal, a supplement to the final EIS or a new final EIS will be prepared and circulated.

- 5.14.2.2 If the proposed action is to be implemented in stages or requires successive federal approvals, a written reevaluation (See Section 5.15) of the continued adequacy, accuracy, and validity of the final EIS will be made at each major approval point that occurs more than three (3) years after approval of the final EIS and a new or supplemental EIS prepared, if necessary.

### **5.15 Written Reevaluation:**

- 5.15.1 The preparation of a new EIS is not necessary when it can be documented that the:

5.15.1.1 Proposed action is reasonably consistent with plans or projects for which a prior EIS has been filed and there are no substantial changes in the proposed action that are relevant to environmental concerns;

5.15.1.2 Data and analyses contained in the previous EIS are still substantially valid and there are no significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; and

5.15.1.3 All pertinent conditions and requirements of the prior approvals have, or will be, met in the current action.

- 5.15.2 The analysis and conclusions in a written reevaluation must be made and certified by an environmental professional. The written reevaluation must contain enough information for the responsible NIGC official to independently evaluate the changes and conclude the contents of the previously prepared environmental documents remain valid or that significant changes require the preparation of a new EIS.

- 5.15.3 A written reevaluation may be circulated to the public at the discretion of the responsible NIGC official.

### **5.16 Revised or Supplemental EISs:**

- 5.16.1 The NIGC shall prepare or have prepared supplements to either the draft or final EISs if there are substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Significant information is information showing dramatic changes to the impacts of the proposed project compared to those identified in the original draft or final EIS.
- 5.16.2 Supplemental documents will be prepared and circulated in accordance with the procedures of this chapter.
- 5.16.3 If a supplement changes the ROD, a new ROD shall be prepared and issued after the supplement has been circulated for 30 days.

### **5.17 Referrals to Council on Environmental Quality (CEQ):**

- 5.17.1 A project may be referred to CEQ when a cooperating or commenting agency disagrees regarding the proposed project's potential to cause unsatisfactory environmental effects. Referrals to CEQ must be no later than 25 days after publication of the final EIS NOA. The NIGC response must be delivered to CEQ no later than 25 days after the referral.

### **5.18 Review/Comment and Adoption of EIS's prepared by other Agencies:**

- 5.18.1 *Comments:* Federal, tribal, state and local agencies/organizations may review and comment on the draft and final EIS. When comments are submitted to the NIGC, they should be specific in nature and organized in a manner consistent with the structure of the draft or final EIS and may identify modifications that might enhance environmental quality or avoid or minimize adverse environmental impacts, and will correct inaccuracies or omissions. Comments will be submitted within the time limits set forth in the request, unless the agency/organization responsible for submitting comments seeks and receives an extension from the responsible NIGC official.
- 5.18.2 *Adoption:* The NIGC may adopt, in whole or in part, a draft or final EIS prepared by another agency. When the NIGC adopts another agency's EIS, the responsible NIGC official must independently evaluate the information contained in the EIS, take full responsibility for the scope and content that addresses the NIGC action, issue its own ROD, and provide

Effective date: TBD

Draft: July 2, 2007

notification to EPA that the NIGC has adopted the EIS. The same time limits described in Section 5.14 also apply to EIS prepared by other agencies and adopted by the NIGC.

#### ***5.19 Reserved***

Discussion Draft

## Appendix A- Resource Categories

The purpose of this Appendix is to provide a list of resource categories to be evaluated in an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The following list is not exhaustive. Resource categories may be added when the proposed action has the potential to impact a resource not listed below.

Resource Categories
Geology and Soils
Land Use
Farmlands
Air Quality
Water Quality (Surface and Ground)
Floodplains
Wild and Scenic Rivers
Coastal Resources
Wetlands
Biotic Communities
Endangered Species
Historic, Architectural, Archeological, and Cultural Resources
Traffic
Noise
Light and Aesthetics
Socioeconomic, Environmental Justice, and Children's Environmental Health and Safety
Hazardous Materials, Pollution Prevention and Solid Waste
Public Services (municipal water supply, waste water services, electric, etc)
Public Safety (Police, Fire, Emergency Medical, etc)
Secondary (Induced/Indirect) Impacts*
Cumulative Impacts*

\*- Evaluation of these impacts can be contained in their own sub-section of the impact evaluation or they may be included with each individual resource category.

## **Appendix B- Example MOU for EIS Cooperating Agencies**

The following is an example of a Memorandum of Understanding (MOU) used when cooperating agencies will be participating in the preparation of an EIS. It is strongly recommended that any potential cooperating agency sign an MOU before being accepted as an official cooperating agency in the preparation of an EIS. The example MOU is only an example and may be modified to fit the individual circumstances of each EIS being prepared. Each cooperating agency representative must sign the MOU. The MOU must then become part of the administrative record.

Discussion Draft



**DRAFT**  
**MEMORANDUM OF UNDERSTANDING**  
**BETWEEN THE**  
**LEAD AND COOPERATING AGENCIES**  
**FOR THE**  
*Tribe Name*  
**PROPOSED**  
*Project Title*  
**ENVIRONMENTAL IMPACT STATEMENT**

This Memorandum of Understanding (MOU) between the National Indian Gaming Commission (NIGC), the lead Federal agency, and, inclusively, the *Cooperating Agency*, and the *Tribe name (if designated as a cooperating agency)* the cooperating agencies, is for the consultation, preparation assistance, and review of an Environmental Impact Statement (EIS) that will describe and analyze the potential environmental effects of the proposed *Project Title* (the Project) located in *Location*. The *Tribe name* is the tribe that has the proposed project. The cooperating agencies' involvement is intended to assist the NIGC with all issues involving the environmental review under their jurisdiction associated with the project. This MOU describes the agencies (signatories) respective responsibilities regarding completion of an EIS pursuant to the requirements of the National Environmental Policy Act (NEPA) and, if applicable, other environmental reviews pursuant to the requirements of the state NEPA-like statute.

**I. PURPOSE**

The purpose of this MOU is:

- (1) To confirm the formal designation of the *Cooperating Agency* and the *Tribe name* as cooperating agencies in the preparation of the EIS;
- (2) To define each signatory's role, obligations, and jurisdictional authority regarding the EIS;
- (3) To provide input in the preparation of an EIS that will enable the NIGC to adequately consider impacts to the natural and human environment and the *Cooperating Agency* and the *Tribe name* to properly address potential project related environmental impacts in connection with their regulatory objectives; and
- (4) To provide a framework for cooperation and coordination among the signatories to facilitate completion of the NEPA process including issuance of required findings and to fulfill other environmental responsibilities each signatory may have.

## II. REGULATORY CRITERIA

Under NEPA [42 USC 4371 *et seq.*], the NIGC, as lead Federal agency, has the responsibility to designate those portions of a NEPA compliance document upon which each cooperating agency will focus its evaluation of environmental issues. The resource designations will be based upon legal jurisdiction or special expertise of the cooperating agency, and will not limit that agency's ability to comment on other environmental resources or aspects of the EIS.

Following the directives of NEPA, the signatories to this MOU shall cooperate fully and share information and technical expertise to evaluate the potential environmental effects of the proposed action and its alternatives. Each signatory shall give full recognition and respect to the authority, expertise, and responsibility of the others. Participation in this MOU does not imply endorsement of the proposed project, nor does it abridge the independent review of the Draft and Final EIS by the signatory agency. The agencies will make every effort to raise and resolve issues during scoping and EIS preparation. The signatories acknowledge that the NIGC, as lead agency, has the responsibility for the content of the Draft and Final EIS and its conclusions.

## III. PROCEDURES

1. The NIGC is the lead Federal agency for this project. It is ultimately responsible for preparing the Draft and Final EIS and for assuring compliance with the requirements of NEPA. Although the NIGC agrees to give full respect and recognition to the jurisdiction of the *Cooperating Agency* and the *Tribe name*, the NIGC is responsible for considering impacts to the quality of the natural and human environments associated with the proposed project. The NIGC cannot delegate its core NEPA responsibilities to the cooperating agencies. In meeting these responsibilities, the NIGC will use the environmental analyses, proposals, and special expertise of the cooperating agencies to the maximum extent possible consistent with its responsibilities, and as the lead agency, will retain ultimate responsibility for the EIS's content (see 40 CFR, 1501.6(a)(2) and CEQ's 40 Questions, No. 14.b.). This includes defining the issues, determining purpose and need of the project, selecting or approving alternatives and mitigation measures, reviewing any required modification of the EIS, responding to comments on the Draft EIS, and retaining responsibility for the conclusions of its environmental analysis. The NIGC will also conduct an appropriate level of public involvement in advance of the combined undertaking.

2. The goal of the signatories is to assist in the preparation of an EIS that contains all the information each signatory needs to fulfill its responsibilities under NEPA *or, if applicable, state NEPA-like statute*, and make independent decisions within its jurisdiction. As such, *Cooperating Agency* and the *Tribe name* are to participate in the NEPA process at the earliest appropriate time, make staff support available, exchange relevant information throughout the EIS process, submit independent recommendations, and assist the NIGC in developing responses to "designated resource" comments received on the Draft and Final EIS, as resources allow. *Cooperating Agency* and the *Tribe name*

will not be responsible for the actual preparation of any portion of the EIS or related technical reports; however, they will provide comments to the NIGC.

3. The procedures for EIS project development and interagency coordination contained in: NEPA; the Clean Water Act - Sections 401, 402, and 404; and the Clean Air Act are incorporated herein by reference.

4. As appropriate, and to enhance the effectiveness of this MOU, the NIGC will work with *Cooperating Agency* and the *Tribe name* to ensure access to the NIGC expertise, data, information, analyses, and comments received. It is understood that any necessary communication with the NIGC's EIS consultant will be with the prior knowledge of the NIGC and *Tribe name*, and in the NIGC's presence, if so desired by the NIGC.

5. The *Cooperating Agency* and the *Tribe name* will each identify a designated Point of Contact (POC) for coordination and consistency on this project. Due to the complexity of the project, the agencies realize that this is a long-term commitment of resources and will make every effort to maintain the same POC through the duration of the NEPA process. If reassignment of the POC becomes necessary, the agency will notify the MOU signatories of said change. In such cases, previous agreements, concurrences, and positions will not be revisited unless there is significant new information or significant changes to the project, environment, or laws and regulations.

6. The signatories will ensure that appropriate coordination, communication, project updates and status reviews occur, as needed, to keep each other current on the project's progress.

7. The NIGC will appropriately incorporate the comments, analysis, recommendations, and/or data submitted by the *Cooperating Agency* and the *Tribe name* in the Draft and Final EIS, and will utilize a systematic, interdisciplinary approach that will ensure the integrated use of the submitted material [40 CFR § 1501.6(a)(2) and 1502.6].

8. The NIGC will promptly inform *Cooperating Agency* and the *Tribe name* of all schedule changes that would affect *Cooperating Agency* and the *Tribe name*'s ability to provide timely input for a document review. Adequate time will be given for agency reviews even if there is significant new information or significant changes to the project, environment, or laws or regulations.

9. To the maximum extent permitted by law, *Cooperating Agency* and the *Tribe name* will keep confidential and protect from public disclosure any and all documents received prior to determination of suitability for public review or release under the directives of the Freedom of Information Act (FOIA). The *Cooperating Agency* and the *Tribe name* will coordinate all FOIA requests received on the project with the NIGC prior to releasing documents. The NIGC will promptly respond to such coordination requests

in order to enable the *Cooperating Agency* and the *Tribe name* to meet its FOIA obligations.

10. *Cooperating Agency* the *Tribe name* agree not to employ the services of any representative or party having a financial interest in the outcome of the proposed project in a capacity directly related to *Cooperating Agency* and the *Tribe name* obligations as a cooperating agency. *Cooperating Agency* and the *Tribe name* will take all necessary steps to ensure that no conflict of interest exists with its consultants, counsel, or representatives employed in this undertaking. [40 CFR 1506.5 (c)] If disclosure statements are obtained as a result of contractor or other selection regarding this action, copies of the disclosure statements will be forwarded to the NIGC.

#### IV. RESOURCE DESIGNATIONS

1. The NIGC, pursuant to its lead agency responsibilities (CEQ 1501.6[b] [3]), makes the following requests based on each of the cooperating agency's respective jurisdictions by law and/or special expertise:

The *Cooperating Agency* and will provide oversight, guidance, and comment to assure the EIS's consistency for compliance with all appropriate federal, tribal, state and local laws, statutes, orders, regulations, and guidance within their jurisdiction by law or special expertise.

#### V. ADMINISTRATION

1. Nothing in this MOU will be construed as affecting the authority of any signatory beyond those agreements contained within this MOU.

2. This MOU does not obligate the NIGC to provide funding for the [*Cooperating Agency Name*] and the [*Tribe Name*] involvement in this effort, nor does it require [*Cooperating Agency Name*] and the [*Tribe Name*] to obligate or expend funds in excess of available appropriations.

3. If a disagreement should develop between the agencies, the POC's will expeditiously attempt to resolve the disagreement through consensus. If timely amicable resolution is not achieved at the POC level, the matter shall be promptly referred to mid-level management of these agencies for their participation in the resolution process. In the event that mid-level managers are unable to reach a satisfactory solution, the persons whose signature appears in Section VI of this MOU will be asked by the NIGC to convene a meeting or a conference call to reach a satisfactory resolution.

4. This MOU shall be terminated when the NIGC issues a Record of Decision or for reasons of good cause upon 30 days prior written notice. An example of good cause would be the *Tribe name* withdrawal of the proposed action.

5. Any signatory may request re-negotiation or modification of this MOU at any time. All signatories will consider the proposed changes, and upon mutual agreement, adopt the proposed changes. The signatory that proposed the change shall provide copies of the adopted revised MOU to the other signatories.

6. This MOU shall be incorporated into or referenced in the Draft and Final EIS for public review so that each signatory's respective roles may be fully understood.

VI. AGREEMENT TO PARTICIPATE IN THIS MOU

\_\_\_\_\_  
Name, Chairman  
National Indian Gaming Commission

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name  
*Cooperating Agency*

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name  
Tribal Chairperson/President/etc  
*Tribe name*

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name/Title  
*Other Cooperating Agencies*

\_\_\_\_\_  
Date

## **Appendix C- Third Party Contracting Guidance**

### ***D-1: Introduction and Purpose***

According to CEQ regulation (40 CFR §1506.5(c)), an Environmental Impact Statement (EIS) must be prepared by the lead agency or an environmental consultant/contractor (contractor). The contractor must be selected by the lead agency (NIGC). The purpose for the lead agency selecting the contractor is to avoid conflicts of interest. However, in most cases, the proponent of a project usually pays for the contractor's services. This is commonly known as "Third Party Contracting." The purpose of this appendix is to provide guidance on important issues raised when selecting and using a contractor.

### ***D-2: Scope of Work***

Before a contractor can be selected, a Scope of Work (SOW) must be developed. It is important to involve the project proponent in the development of a SOW. Both the NIGC, as the lead agency, and the Tribe, as the project proponent, should come to terms on what will be included in the SOW. The SOW should only contain those tasks the NIGC and Tribe have identified as being required to comply with NEPA during the preparation of the EIS. The SOW should not contain any tasks that would be undertaken after the EIS is complete and the ROD is issued.

As a general rule, a SOW should contain the following: an introduction of the project, the conceptual design of the proposed project, a task-by-task listing of the analysis required to complete the EIS, the requirements needed to comply with NEPA, the NIGC procedures contained in this manual, and other laws, and the keeping of the administrative record. The task(s) that identify the analysis should include any specific methodologies that are known to be needed. The task(s) should also include the identification of and support for meetings, teleconferences, and hearings. The important thing to remember when developing a SOW is to include everything needed to comply with NEPA. If task(s) are not identified, the Tribe may have to adjust the SOW which can increase the cost of preparing the EIS.

The SOW should also identify how prospective contractors package their proposals. Establishing a single format for proposals will make it easier to evaluate each contractor's proposal against the others. If a contractor plans to sub-contractors for some tasks, it should be noted in their proposal. It may be necessary for the NIGC to consult with the Tribe to identify prospective contractors. The SOW will then serve as the backbone of the "Request for Proposal" (RFP).

### ***D-3: NIGC Evaluation and Selection***

Once all prospective contractors have submitted their proposal to prepare the EIS, the NIGC official will review and evaluate each proposal. The evaluation can take one or more of the following forms: interviews with the proposed Project Manager, calling references, and/or reviewing other EISs they have prepared. The NIGC official should develop a ranking system to aid in identifying the best contractor candidate. Once the NIGC official has evaluated each proposal and ranked it, the contractor should be notified. In addition, the Tribe should also be notified. At this point it is important for the NIGC official to consult with the Tribe to ensure a financial mechanism is in place so as not to delay the start of the EIS preparation by the contractor.

In notifying the Tribe and the contractor, the NIGC official should develop a Memorandum of Understanding (MOU). This MOU should delineate the roles and responsibilities of the NIGC, the Tribe, and the contractor during the preparation of the MOU. All three parties (the NIGC, the Tribe, and the Contractor) should then have the appropriate person with that organization sign the MOU.

### ***D-4: Financial and other interest disclosure***

In accordance with 40 C.F.R. §1506.5(c), the contractor is required to sign a disclosure form that states their company has no financial or other interest in the outcome of the EIS. (See Form on next page). If the contractor plans to use sub-contractors, they are also required to sign a disclosure form. These forms must be kept in the administrative record.



**Disclosure Statement**  
**For the**  
**Project Title**  
**Environmental Impact Statement**

CEQ Regulations at 40 CFR 1506.5(c), require contractors who will prepare an Environmental Impact Statement (EIS) to execute a disclosure statement, specifying that they have no financial or other interest in the outcome of the EIS. The term “financial or other interest in the outcome of the project” means any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g. if the project would aid proposals sponsored by the firm’s other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit.

In accordance with these requirements,  
\_\_\_\_\_ (company/individual name) hereby certifies that they have  
no financial or other interest in the outcome of the project.

Certified by:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name and Title

\_\_\_\_\_  
Company Name

\_\_\_\_\_  
Date